Docket for 02-1205

(12)

No. 02-1205 Status: ARGUED
Title: Edith Jones, et al., on Behalf of Herself and a Class of Others Similarly Situated, Petitioners
v.
R. R. Donnelley & Sons Company
Docketed: February 20, 2003
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (01-3271)
Decision Date: November 21, 2002

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Feb 13 2003	Petition for writ of certiorari filed. (Response due March 24, 2003)
Mar 10 2003	Order extending time to file response to petition to and including April 14, 2003.
Apr 11 2003	Brief of respondent R. R. Donnelley & Sons Company in opposition filed.
Apr 22 2003	Reply of petitioners Jones, Edith, et al., on Behalf of herself and a Class of Others Similarly Situated filed.
May 19 2003	Petition GRANTED.
Jun 18 2003	Extension of time within which to file petitioners' brief on the merits to and including August 4, 2003.
Jul 14 2003	Extension of time for filing respondent's brief on the merits to and including September 18, 2003.
Jul 31 2003	Joint appendix filed.
Jul 31 2003	Brief of petitioners Edith Jones, et al., on behalf of herself and a Class of Others Similarly Situated filed.
Aug 4 2003	Brief amici curiae of Lawyers Committee for Civil rights Under Law, et al. filed.
Aug 4 2003	Brief amicus curiae of United States filed.
Sep 5 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 10 2003	Further extension of time within which to file respondent's brief on the merits to and including October 2, 2003.
Sep 17 2003	Brief amicus curiae of Equal Employment Advisory Council filed.
Oct 2 2003	Brief of respondent R. R. Donnelley & Sons Company filed.
Oct 2 2003	Brief amici curiae of Alabama, et al. filed.
Oct 6 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 26 2003	Motion for leave to allow Alabama to participate in oral argument as amicus curiae and for divided argument filed by respondent and Alabama.
Oct 31 2003	Reply of petitioners Edith Jones, et al. filed.
Nov 17 2003	Motion for leave to allow Alabama to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 10 2003	SET FOR ARGUMENT Tuesday February 24, 2004.
Dec 12 2003	Record received from the U.S.C.A for the 7th Circuit. (1 envelope)
Dec 17 2003	CIRCULATED.
Jan 27 2004	Record received from the U.S.D.C. for the Northern District of Illinois. (2 boxes)

Feb 24 2004 Argued. For petitioners: H. Candace Gorman, Chicago, ILL.; and on behalf of the United States, as amicus curiae, Gregory G. Garre, Assistant to the Solicitor General, Department of Justice, Washington, D.C. For respondent: Carter G. Phillips, Washington, D.C.; and Kevin C. Newsom, Solicitor General, Montgomery, Ala. (for Alabama, et al., as amici curiae.)

Supreme Court, U.S.
FILED

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NO. OFFICE OF THE CLERK

In the Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED,
Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY, A DELAWARE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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69 pp

QUESTION PRESENTED FOR REVIEW

Does the four-year "catch-all" limitations period of 28 U.S.C. §1658 apply to new causes of action created by public law 102-166, 105 Stat. 1071, the Civil Rights Act of 1991, which were codified at 42 U.S.C. §1981(a) and (b)?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners are, EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, DOROTHY JEAN EPPS, ELLIS JACKSON, SR., ETHYL WILLIAMS, WILLIE MOORE, EDDIE MCGEE, JAMES NEVILS, JR., JOSEPH BEVILL, SR., MARY BECKUM, CLARENCE BOLDS, EDITH BOWLES, CURTIS BROWN, TOM GRIFFIN, MARGIE HARRIS, MAURICE HAYES, ALBERT JACKSON, VENNIE LAWSON, RAYMOND LEWIS, HELLEN HARRIS, DAVID ARMSTRONG, DONNA BENNETT, ALBERT WALKER, ROSE M. SMITH, JOSEPHINE LOVE, FLOYD POPE, ERNESTIN JAMISON, TOMMY MOORE, RECHINNA SHELTON, FRANK MORRIS, VIEEN LEE, ELMORE DOBSON, ROSIE SMITH JAMES STROUD, EUNICE SIMON, HAROLD SMITH, RICHARD MEBANE, CHARLES COLLIER, PHIL JAMES, LOTTIE SHELTON, EDGAR PATTON, ROBERT JACKSON, THLEMA TOWNSEND, LUTHER WARD, JUANITA WALKER, THELMA WESTBROOK, GERALDINE CRENSHAW, GLENDA BELL, FLOYD POPE, JOHN W. ADAMS, JAMES S. ADAMS, JAMES TATE, LUELLA BRADFORD, CHARLIE MAE GILREATH, ERTHA HAYNES, ANNIE WELLS, CATHERINE JAMES, MELVIN HAMILTON, WENDELL SHUMATE, JOHN GREGORY, CLEVELAND ROBERTSON, CHARLES HARRIS, EVELYYN FOSTER, DONALD GRUNDY, RONALD CARTER, OTIS MIXON, ROOSEVELT DIXON, HARVEY MORRIS, THELMA TOWNSEND, ALBERT T. WALKER, BRENDA WASHINGTON, PEARLIE BENNETT, MAURICE JACKSON, ALICE F. JONES SMITH, PATRICIA LUCCADO, EDITH J. BOWLES, MILDRED SADDER, EVELYN FOSTER, JUANITA

FOSTER, DERRICK SMITH, JOHN D. GREGORY, WILLIAM BURTON, ERNEST WATSON, HAZEL FARABEE, JESSIE PETERSON, MANUEL MANTECA, ALTHEA A. BILLINS, WANDA SPURLOCK, KENNETH CHRISTMAS, ARTHUR L. CASEY, HENRY L. BANKS, DELORES McCALL, PRINCE BOYKIN, GLORIA WOODS, CELESTINE STEVENSON, FANNY MASON, ERNESTINE HOLLIMON, JOHN MASON, WILBUR POST, WILLIE CASEY, RALPH GREEN, BENNY GALBRAITH, CHARLES HARRIS, CLARENCE HILLIARD, ROCHELLE MYERS, DONNA BENNETT, LAWRENCE NEWBELL, BARBARA HULL, LOUIS JEFFERSON, CHRISTINE NICHOLSON, ANN HARPER, ANTHONY SIMON, WILLIAM SMITH, HELEN LENOIR, DIONNE ERMON, CARL DAVIS, MARGRET WATKINS, JOAN BROWN, MICHELLE LOLLES, RITA HARRISON, AUGUSTUS WILLIAMS, MARTIN BLAKE, LEON WILLIAMSON AND ALBERTA SMITH, all individual citizens of the United States, residing in the Northern District of Illinois, representing themselves and a class of African American employees of R.R. Donnelley who were employed at the Chicago Manufacturing division (CMD) and who were discharged during the shutdown of that division and were not transferred to another Donnelley division. Petitioners were the Plaintiffs in the District Court and the Appellees in the Seventh Circuit Court of Appeals.

Respondent

R.R. Donnelley is a corporation, which is publicly traded. Petitioners are unaware of any publicly traded company that owns ten (10%) percent or more of said corporation's stock. Respondent Donnelley was the defendant in the District Court and the Appellant in the Seventh Circuit Court of Appeals.

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Petitioners respectfully petition for a Writ of Certiorari to review the decision of the Seventh Circuit Court of Appeals in this case.

OPINIONS BELOW

The Seventh Circuit order denying the timely petition for rehearing and rehearing en banc is at App A at 1a. The Seventh Circuit opinion (App. B at 3a) is reported at *Jones et al v. R.R. Donnelley*, 305 F.3d 717 (7th Cir. 2002). The District Court opinion (App. C at 28a) is reported at *Jones et. al. v. R.R. Donnelley*, 149 F.Supp.2d 459 (N.D.Il. 2001).

JURISDICTION

The opinion of the United States Court of Appeals was decided on September 16, 2002. The Court of Appeals entered an order denying a timely petition for rehearing and rehearing en banc on November 21, 2002.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. Public Law 102-166, 105 Stat. 1071 (Civil Rights Act of 1991, codified at 42 U.S.C. § 1981 (a) and (b);

B. Revised Statutes § 1977 (42 U.S.C. § 1981, Civil Rights Act of 1866);

C. Public Law 101-650 Sec. 313 (28 U.S.C. § 1658, Judicial Improvements Act of 1990, as amended).

Public law 102-166, 105 Stat. 1071
(42 U.S.C. § 1981(a) and (b) of the Civil Rights Act of 1991) provides:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exaction's of every kind, and to no other.
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Revised Statutes § 1977 (42 U.S.C. § 1981 Civil Rights Act of 1866) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and

> property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Public law 101-650 Sec. 313 (28 U.S.C. § 1658 Judicial improvements act of 1990) which was enacted on December 1, 1990, contained only section (a) and was subsequently amended in July 2002 to add section (b), and provides:

> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.
>
> (b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of--
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

STATEMENT OF THE CASE

This case was filed on November 25, 1996 as a nationwide class action alleging race discrimination under

Section 1981(b) of the Civil Rights Act of 1991. The class consists of all African American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division (CMD) and who were discharged during the shutdown of that division and were not transferred to another Donnelley division. The shutdown of the division took place during the period of January 1993 through early 1995. During that time period R.R. Donnelley terminated approximately 586 African-American employees from the CMD. The data produced by Donnelley shows that 24.9% of all white employees were transferred to other divisions while only 2.3% of the African-American employees were transferred.

Defendant filed a motion for partial summary judgment against those Plaintiffs whose employment terminated prior to November 26th, 1994 (the two-year Illinois personal injury statute of limitations). District Court Judge Matthew Kennelly found that the statute of limitations for a claim under section 1981(b) of the Civil Rights Act of 1991 is controlled by the "catch-all" statute of limitations codified at §28 U.S.C. §1658, (Judicial Improvements Act of 1990 as amended) and is thus four years. Because this cause of action was filed on November 25, 1996, the statute of limitations under Judge Kennelly's ruling reaches back to November 25, 1992. All claims in this lawsuit fall under the 1991 Civil Rights Act and are timely under the four-year statute.

The Seventh Circuit panel reversed the decision of the District Court, holding that Congress intended to have §1658(a) apply only when Congress establishes a new cause of action and does not apply to statutes that have "roots in" or "otherwise reference" laws that preexist §1658 (*Jones v. R.R. Donnelley*, 305 F.3d 717, 728 (7th Cir. 2002).

Plaintiffs therefore, timely petitioned for rehearing and rehearing *en banc*, which was denied on November 21, 2002.

REASONS FOR GRANTING THE PETITION

1. There is a split in the Circuits regarding the effect of §1658 (the "catch all" statute of limitations) as it relates to claims under Section 1981(b) of the 1991 Civil Rights Act.

The issue raised in this case is of exceptional importance because there is a split in the Circuits regarding the effect of §1658 (the federal "catch all" statute of limitations) on §1981(b) of the Civil Rights Act of 1991. Section 1658 provides for a four-year statute of limitations for all civil actions arising under an Act of Congress enacted after December 1, 1990 unless the Act provides for its own statute of limitations. *See*, 28 U.S.C. § 1658. Despite the clear language of that statute, the Circuit Courts are split on the effect of §1658 on civil actions that arise under §1981(b) of Civil Rights Act of 1991.

The Tenth Circuit found that claims which this Court in "*Patterson* said could not be brought under the pre-1991 version of §1658, but which can be made only by virtue of §1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after §1658. Section 1658 applies to those claims." *Harris v. Allstate Insurance Co.*, 300 F.3d 1183, 1189-90 (10th Cir. 2002). In so ruling the 10th Circuit adopted, almost verbatim, the reasoning of the District Court in petitioners' case. However the Seventh Circuit, and a split Third Circuit, has held that §1658 does not apply to acts, like the 1991 Civil Rights Act, which has "roots" in previous laws. *Jones v. R.R. Donnelley*, 305 F.3d

717, 721 (7th Cir. 2002). *Zubi v. A T & T*, 219 F.3d 220, 225-6 (3rd Cir. 2000)

The Sixth, Ninth and Eleventh Circuits have been presented with cases in which the impact of §1658 upon §1981(b) was raised, but did not address the issues directly. *See, Young v. Sabbatine*, 142 F.3d 438 (6th Cir. 1998) (remanding question to the district court to determine whether §1658 applied, District Court then decided in favor of the four year statute of limitations, 1999 U.S. Dist. LEXIS 22487, *14-17); *Flores v. Coley*, 72 F.3d 135 (9th Cir. 1995) (determining that, because of the date of the allegedly discriminatory conduct, resolution of the §1658/§1981(b) issue was not required.); *Taylor v. Alabama Intertribal Council Title IV JTPA*, 261 F.3d 1032, 1033 (11th Cir, 2001) (because civil rights action under §1981 could not be maintained against Native American tribe, resolution of the §1658/§1981(b) issue was not required).

As the District Court below and the Tenth Circuit noted in their respective rulings, there were more than 25 separate district court opinions at the time of the district court decision herein, with conflicting positions regarding the applicability of §1658 to §1981(b) claims. *Harris*, 300 F.3d at 1188 (citing *Jones v. R.R. Donnelley*, 149 F.Supp.2d 459, 463 (N.D.Il. 2001).) Since those decisions, district courts continue to wrestle with this issue both in the context of §1981 and other newly enacted statutes with "roots" in previous laws. *Onyi v. Learjet, Inc.*, 2003 WL 124141 (D.Kan. Jan 6, 2003); *Verizon Maryland Inc. v. RCN Telecom Services, Inc.*, 232 F.Supp.2d 539 (D.Md. 2002); *Velez v. QVC, Inc.*, 227 F.Supp.2d 384 (E.D.Pa. 2002); *Donofry v. Autotote Systems, Inc.*, 795 A.2d 260 (N.J. Super.A.D. 2001); *Kinley v. Norfolk Southern Railway Co.*, 230 F.Supp.2d 770 (E.D. Ky. 2002); *Estrada v. Trager*, 2002

WL 31053819 (E.D.Pa. Sep 10, 2002); *Donoghue v. Doherty*, 2002 WL 1400293 (N.D.Ill. Jun 27, 2002); *Engelhard Corp. v. Springfield Terminal Ry. Co.*, 193 F.Supp.2d 385 (D.Mass. 2002); *Turner v. National R.R. Passenger Corp.*, 181 F.Supp.2d 122 (N.D.N.Y. 2002); *Davis v. Smithkline Beecham Corp.*, 2001 WL 1530365 (D.Del. Nov 29, 2001); *Campbell v. National R.R. Passenger Corp.*, 163 F.Supp.2d 19 (D.D.C. 2001); *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655 (N.D. Ga. 2001); *Jones v. Motorola, Inc.*, 2001 WL 864273 (N.D.Ill. Jul 30, 2001). The effect of this split in the circuits and within the district courts across the country is to have the same causes of action (and in theory the same defendant) subject to differing limitations periods within and between the circuits.

2. The Circuit Court decisions that hold that §1658 does not apply to the Civil Rights Act of 1991 conflict, in principle, with this Court's decision in *Rivers v. Roadway*, because *Rivers* held that the operative provisions of the Civil Rights Act of 1991 were new causes of action and not retroactive.

The Seventh and Third Circuit's decisions conflict, in principle, with this Court's decision in *Rivers v. Roadway*, 511 U.S. 298, 313-14 (1994). Section §1981(b) was enacted as part of the Civil Rights Act of 1991, which followed this Court's ruling in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, the Court held that the words "to make" contracts limited §1981 to discrimination only in the formation of a contract. (*Id.* at 176-77) This deemed non-actionable post-contract claims of discrimination in the terms and conditions of employment, such as the claims that

Petitioners raise in this case. Consistent with the *Patterson* decision, this Court recognized in *Rivers v. Roadway Express*, 511 U.S. 298, 313-14 (1994) that §1981(b) created an entirely new cause of action when it held that the 1991 Civil Rights Act should not be applied retroactively. This Court found that the Act "enlarged the category of conduct that is subject to §1981 liability," and that its statement of purposes, instead of referring to "restoring" preexisting rights, describes the Act's function as "expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* The fact that §1981(b) of the 1991 Civil Rights Act is "framed as a gloss on section 1981's original ' make and enforce contracts' does not demonstrate an intent to apply the new definition to past acts." *Id.* at 308

If, as this Court has held, the new definition of "to make" contracts could not be applied to "past acts", it is inconceivable how the old definition could have any relevance in determining the application of the Civil Rights Act of 1991 to §1658. Without the enactment of the Civil Rights Act of 1991, Petitioners' claims in this case would not have existed.

The Seventh Circuit's finding that §1981(b) is "solely definitional" (*Jones v. R.R. Donnelley*, 305 F.3d 717, 727 (7th Cir. 2002)), not only conflicts in principle with this Court's decision in *Rivers*, but also undermines the breath and extent of the 1991 Civil Rights Act. When Congress enacted the Civil Rights Act of 1991, subsection (b) changed the very essence of the language codified as subsection (a). The fact that this Court found that the Civil Rights Act of 1991 was not retroactive showed unequivocally that the new law was not an explanation of an old act, but instead "created new causes of action that were not cognizable under the pre-1991 version of the statute". *Jones v. R.R. Donnelley*, 149 F.Supp.2d 459, 462, 464-5 (N.D.Il., 2001).

As is explicit in this Court's decision in *Rivers* and as stated by the District Court, §1981 prior to the enactment of the 1991 Act, "protected just two rights: the right to make contracts, which 'extend[ed] only to the formation of a contract but not to problems that may later arise from the conditions of continuing employment,' and the right to enforce contracts, which 'embrace[d] protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race.'" *Id.* at 461-2, citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-677 (1989). As the district court further held, it is "'emphatically the province and the duty of the judicial department to say what the law is,' *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), and in *Patterson* the Supreme Court determined *not* that §1981 should be narrowed despite its original intent, but rather that the statute as enacted in 1866, was never meant to reach certain forms of conduct." *Jones*, 149 F.Supp.2d at 465, (emphasis added).

3. The Seventh Circuit's decision conflicts with the plain language of Section 1658 and renders the statute a virtual dead letter.

In finding that §1658 applied to Petitioners' case, the District Court followed the well-established principles of statutory interpretation established by this Court. The first and foremost analysis when interpreting a statute should be the "plain meaning" of the words that comprise the statute. *Kaiser Aluminum & Chemical Corp. v. Bonbon*, 494 U.S. 827, 835 (1990), citing *Consumer Product Safety Common v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "[I]f the intent of [a statute] is clear," then the plain meaning is conclusive and the analysis need proceed no further. *Norfolk*

& Western Ry. Co. v. American Train Dispatchers, 499 U.S. 117, 128 (1991), quoting *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

Section 1658 clearly states that it applies to "a civil action arising under an Act of Congress enacted after the date of the enactment of this section..." 28 U.S.C. §1658. "Enact" means to make into law by authoritative act, Black's Law Dictionary 546 (7th Ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted". The term "civil action" is a term of art derived from the Federal Rules of Civil Procedure, which states that a "civil action" is commenced by the filing of "a complaint". Fed. R. Civ. P. 2 & 3.

The Civil Rights Act of 1991 was plainly an "Act of Congress" "enacted" after December 1, 1990, as Congress specifically used both words in the law's preamble, including using the phrase "be it enacted", and the 1991 law was not passed until November 1991, almost a year after the passage of §1658. The District Court properly held that §1658 unambiguously applies to Petitioners' §1981(b) action and that despite court decisions to the contrary, §1658 was not susceptible to more than one reasonable interpretation. *Jones v. R.R. Donnelley*, 149 F.Supp.2d 459, 464 (N.D.Il. 2001). Therefore, Petitioners' civil action, which could not be brought under the pre-1991 version of §1981, "but which can be made only by virtue of §1981(b)," "clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after §1658," and §1658 should apply to those claims. *Id.*

This Court recognized the plain and unambiguous language of §1658 when it explained that "[t]he expectation

[of borrowing limitations from state law] is reversed for statutes passed after December 1, 1990, the effective date of 28 U.S.C. §1658...which supplies a general, four-year limitations period for *any federal statute* subsequently enacted without one of its own." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 n.1 (1995) (emphasis added). Petitioners' lawsuit was filed under the Civil Rights Act of 1991, which is a federal statute enacted after December 1, 1990 and which provided no limitations period for Petitioners' claims. Therefore, under the plain and unambiguous language of §1658, any complaint, such as the Petitioners, that is filed under a federal statute that was enacted after December 1, 1990 has a four-year statute of limitations, unless the statute provides for its own limitations period.

Under the Seventh Circuit's interpretation, §1658 has been rewritten to apply only to a civil action arising "under any new Act of Congress established without reference to preexisting law". (*Jones* at 725) In order to reach the conclusion it did the Seventh Circuit had to ignore not only the established definition of "Act of Congress", but also the procedures of Congress in enacting legislation which is primarily through amendment. The holding is contrary to the plain language of §1658 and the consequences of this holding will, in effect, nullify the statute because nearly all Acts of Congress have "roots in" or "otherwise reference" preexisting law (for example, the Telecommunications Act of 1996 which has its roots in the Telecommunications Act of 1934, (*See, MCI v. Ill.Bell*, 1998 WL 156674 (N.D. Ill. 1998)).[1]

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[1] Legislation relating to regulation of the Internet, which is currently a hot area for congressional action is rooted in the Telecommunications Act of 1934. Similarly, the Securities and

This Court should reject the Seventh Circuit's decision that requires we ignore §1658 for all legislation passed after December 1, 1990, if that legislation has roots in or is otherwise dependent on, provisions of any Act that predates §1658. *Jones v. R.R. Donnelley*, 305 F.3d 717, 725 n.5 (7th Cir. 2002). That interpretation requires the courts to ignore the plain language of §1658 and exclude amendments that create entirely new causes of action (like this one) and any new causes of action that refer or relate to previous Acts (which would include just about every Act of Congress passed within the last 100 years because Congress does nearly all its work through amendments). Petitioners respectfully submit that such an interpretation is untenable and suggest that this Court's task is to apply the plain language of §1658 or, if found ambiguous, to harmonize it with the clear intent of Congress, which was to establish a more uniform federal Statute of Limitations and to do away with "borrowing". Neither the means of statutory construction employed by the Seventh Circuit nor its ultimate conclusion satisfactorily resolve these issues.

Exchange Act of 1934 is the focus of much current legislation. In addition, under the panel's rationale, if Congress decided, for example, to enact federal legislation under §5 of the 14th Amendment, even though the legislation would be new, it would *not* be considered a new cause of action because its roots are in the Constitution. Therefore, under the Panel's interpretation even brand new acts of Congress *enacted after* §1658 would not partake of the four-year statute because its roots are found in the Constitution or Acts of Congress. Ironically even §1658, which established, for the first time, a uniform federal statute of limitations, has its roots in the Justice Act of 1985 and could ultimately be traced back to the Judiciary Act of 1789.

As quoted by the District Court, this Court has "stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" "[J]udicial inquiry into the applicability of [a statute] begins and ends with what [a statute] says and with what [statute] does not." *Jones*, 149 F.Supp.2d at 463-4, quoting *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-4 (1992). The District Court found that, "looking at the plain language of §1658, this seems to this Court to be an easy answer". *Id.* at 462.

4. The Seventh Circuit's decision is also contrary to the intent of Congress.

It is only when a statute is ambiguous that the courts review the legislative history of a statute in an attempt to determine Congressional intent. Petitioners respectfully suggest such an inquiry is not necessary here. However, if this Court determines it should look to the intent of Congress, as the Seventh Circuit did, the Seventh Circuit's decision is contrary to that intent because Congress intended to do away with "borrowing" and simplify the Federal Courts' task in determining statutes of limitations. The Seventh Circuit's decision instead complicates that task.

Prior to the enactment of §1658 many courts, including the Seventh Circuit, directed pleas to Congress to enact uniform federal statutes of limitations. "We join the growing number of commentators and courts who have called upon Congress to eliminate these complex cases, that do much to consume the time and energies of judges but that do little to advance the cause of justice, by enacting federal limitations periods for all federal causes of action." *Sentry Corp. v.*

Harris, 802 F.2d 229, 246 (7th Cir. 1986); *London v. Coopers & Lybrand*, 644 F.2d 811, 813 (9th Cir. 1981).

In response, Congress established the Federal Courts Study Committee, which issued a report critical of the practice of borrowing from state statutes. The Federal Courts Study Committee recommended that Congress adopt uniform limitations periods for federal claims rather than "borrowing" the most analogous state law limitations period. *See*, Fed. Courts Study Comm., Judicial Conference of the U.S., Report of the Federal Courts Study Committee, 93 (1990). Congress answered that call with the passage of §1658 and although Congress only enacted §1658 prospectively, the statute clearly states that it applies to all Acts of Congress enacted after December 1, 1990. *See*, 28 U.S.C. §1658. Under the Seventh Circuit's decision, however, the ameliorative function of §1658 has been replaced by a complex, virtually unworkable rule.

The Seventh Circuit held that the plain language of §1658 was ambiguous because it does not address the "eventuality when a cause of action arises under two different acts, one enacted before and one enacted after the effective date of §1658." *Jones v. R.R. Donnelley*, 305 F.3d 717, 724 (7th Cir. 2002). Petitioners respectfully disagree with the Seventh Circuit's premise that the statute did not address causes of action arising under two acts and disagree that their cause of action falls under two Acts. It does not.

Petitioners' cause of action falls under *one act*, the 1991 Civil Rights Act. The Civil Rights Act of 1991 was clearly enacted after §1658 and until that Act Petitioners did not have a viable cause of action. In addition, §1658 as amended *does* address the situation of when a cause of action arises under two different statutes, and the amended Statute

clearly shows that acts of Congress enacted after December 1, 1990, which have their roots in pre-existing statutes, are subject to the four-year statute unless specifically exempted under §1658. Congress amended §1658 on July 30, 2002 to establish that the amendments to Securities and Exchange Act of 1934 that took place in 2002 (The Sarbanes-Oxley Act 15 U.S.C. §7201) would not use the statute of limitations found in §1658 but would instead have its own statute of two and five years. It is clear from that amendment that Congress understood that the four-year statute *would have* applied to those actions had they not amended §1658.

The Seventh Circuit's interpretation is unworkable and contrary to congressional intent because it, in effect, rewrites the definition of "Act of Congress", tells Congress that it will not treat "new" legislation as new legislation unless Congress abandons its current practice of working through amendments; and, forces Congress to repeat in its legislation the full text of any other section on which the new bill relies or references if it wishes the court to recognize the new act as "new". Surely this Court does not want to be in the position of requiring Congress to pass completely new sections of the Code each time it enacts legislation in order to achieve the result it clearly stated in §1658.

5. Section 1988 mandates that the courts first look to federal law before referring to state law in actions brought under the civil rights acts.

Both this Court and Congress direct that before a state statute of limitations can be applied to petitioners' civil rights claim, there must be an examination of whether there is an applicable federal rule or statute. The Seventh Circuit's

holding ignores the reasoning of this Court's decision in *Wilson v. Garcia*, 471 U.S. 261, 268-269 (1985), where it stated:

> When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. [Footnotes eliminated]. In 42 U.S.C. §1988, Congress has implicitly endorsed this approach with respect to claims enforceable under the Reconstruction Civil Rights Acts. The language of §1988, [footnote eliminated] directs the courts to follow "a three-step process" in determining the rules of decision applicable to civil rights claims: "First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' [42 U.S.C. §1988]. If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum State. Ibid. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.' Ibid." quoting from *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984). *Id.* at 260-261. (emphasis added)

The Court then went on to state:

> Our identification of the correct source of law properly begins with the text of §1988. [footnote eliminated]. Congress' first instruction in the statute is that the law to be applied in adjudicating civil rights claims shall be in "conformity with the laws of the United States, so far as such laws are suitable." This mandate implies that resort to state law -- the second step in the process -- should not be undertaken before principles of federal law are exhausted. *Id.* at 261.

See also, *Chardon v. Fumero Soto*, 462 U.S. 650, 663 (1983) (Rehnquist, dissenting) ("If there is any federal law "adapted to the object" of the civil rights laws, 42 U.S.C. §1988 commands that federal courts apply that law in civil rights actions. The question is whether there is any federal rule of law applicable to the limitations issue. If there is, the court must depart from the general rule of reference to state law in actions brought under the civil rights laws") (emphasis added).

As this Court has already recognized, in *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 n.1 (1995) the expectation of borrowing limitations from state law was reversed for statutes passed after December 1, 1990. Therefore, because there is a federal law applicable to the limitations issue (§1658) that statute should apply to petitioners' §1981(b) claims. *See also, Young v. Sabbatine*, 142 F.3d 438 (6th Cir. 1998) (remanding case to lower court to consider whether §1658 required the application of the four-year statute of limitations to §1981 claims).

CONCLUSION

For the reasons set forth herein and for such other reasons as this Court deems just and appropriate, Petitioners ask this Court to grant this petition for a Writ of Certiorari and find that the four-year statute of limitations set forth in 28 U.S.C. §1658 applies to all civil actions arising under Acts of Congress enacted by Congress after December 1, 1990, (unless otherwise provided by law) whether or not those civil actions are based on amended laws or laws that have roots in or otherwise reference earlier or preexisting law, and for such other and further relief as this Court deems just.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3271

[Filed November 21, 2002]

EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, et al., Plaintiffs-Appellees,

v.

R.R. DONNELLEY & SONS COMPANY, a Delaware corporation, Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 7717
Matthew F. Kennelly, Judge

JUDGES:
Before Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

Upon consideration of the Plaintiffs-Appellees' petition for rehearing *en banc*, filed on September 27, 2002, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* is hereby DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 01-3271

[Filed September 16, 2002]

EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, et al., Plaintiffs-Appellees,	)
v.	)
R.R. DONNELLEY & SONS COMPANY, a Delaware corporation, Defendant-Appellant.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 7717
Matthew F. Kennelly, Judge

JUDGES:
Before RIPPLE, KANNE and EVANS, Circuit Judges.

OPINION

RIPPLE, *Circuit Judge*. Several classes of plaintiffs brought suit against their former employer, R.R. Donnelley & Sons ("Donnelley"), for race discrimination pursuant to 42 U.S.C. § 1981. Before the court is a single certified question: "Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the 'catch-all' four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state?" R. 248 at 2. The district court determined that § 1658 provided the applicable statute of limitations for the plaintiffs' claims. Because we find ourselves in respectful disagreement with the district court, we reverse its decision and remand the case for further proceedings consistent with this opinion.

I BACKGROUND

A.

The plaintiffs are members of three classes of African-American former employees of Donnelley's Chicago Manufacturing Division, many of whom were terminated or transferred from their employment on or before July 29, 1994, in connection with the closing of that facility.[1] Their

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[1] The district court certified three classes of employees:

> All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division;
>
> All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1991 to the present as non-regular employees (including temporary, casual, contract, contingent, task force, etc.);
>
> All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Pontiac division; (c) the Chicago Financial Division; or (d) the Chicago Manufacturing Division from November 1992 to present and were subjected to racial harassment so pervasive as to create a hostile working environment.

R. 230 at 39. The present issue concerns those individuals belonging to all of the classes whose employment was terminated on or about July 29, 1994.

claims against Donnelley include discriminatory transfer, discriminatory termination and racially hostile work environment. They filed their initial pleading in this case on November 25, 1996.

In its answer, Donnelley raised the statute of limitations as an affirmative defense; Donnelley claimed that the "alleged 42 U.S.C. § 1981 claims which arose more than two years prior to the filing of the complaint are barred by the applicable statute of limitations." R. 2 at 16. Soon after filing its answer, Donnelley moved for summary judgment on the

claims of those plaintiffs whose employment was terminated on or around July 29, 1996.[2] According to Donnelley, this court's decision in *Smith v. City of Chicago Heights*, 951 F.2d 834, 836 n.1 (7th Cir. 1992), established that Illinois' two-year statute of limitations for personal injury claims was the applicable statute of limitations for claims of race discrimination arising in Illinois and brought under 42 U.S.C. § 1981. *See* R. 10 at 2. Because the complaint was not filed until November 1996, more than two years after the plaintiffs' last employment at Donnelley, their claims were time-barred.[3]

In their response, the plaintiffs presented three reasons why their claims should be considered timely. First, the plaintiffs argued that the termination of their employment was part of a larger program of discrimination by Donnelley and that, consequently, "no statute of limitations should be imposed in this case." R. 102 at 4. In the alternative, the plaintiffs submitted that the appropriate statute of limitations for violations of 42 U.S.C. § 1981 was the four-year statute of limitations provided in 28 U.S.C. § 1658. Specifically, the plaintiffs maintained that their claims arose under amendments to § 1981 enacted through the Civil Rights Act of 1991. Their claims, therefore, arose under the 1991 Civil Rights Act, a law enacted after § 1658, and therefore were subject to § 1658's four-year statute of limitations. Finally, the

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[2] Donnelley's motion was not confined to the statute of limitations issue, but included other issues that are not before the court on this appeal.

[3] Donnelley also represented this issue at least two other times later in the litigation before the district court ruled on the motion.

plaintiffs argued that the doctrines of equitable estoppel and equitable tolling should apply to extend the statute of limitations to allow the plaintiffs to maintain their claims.

B.

The parties eventually narrowed the issue to be resolved by the district court: The appropriate statute of limitations to apply to the claims of those plaintiffs whose employment was terminated in conjunction with the closing of the Chicago facility. The district court began its analysis by looking at the language of § 1981 prior to the adoption of the 1991 Civil Rights Act:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1990). The court then noted that in *Patterson v. McLean Credit Union*, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989), the Supreme Court had interpreted § 1981 to protect just two rights:

> the right to make contracts, which "extended only to the formation of a contract, but not to problems that may arise later from the

> conditions of continuing employment," and the right to enforce contracts, which "embraced protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race."

R. 244 at 4 (quoting *Patterson*, 491 U.S. at 176-77). Consequently, after *Patterson* was handed down, § 1981 had a very limited scope that did not include claims for discriminatory termination or hostile work environment.

As part of the Civil Rights Act of 1991, the district court noted, Congress amended § 1981 to define "'make and enforce contracts' to include 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Id.* (quoting 42 U.S.C. § 1981(b)). Under this language, aggrieved employees could pursue claims of discrimination based upon events that occurred during the course of their employment.

After reviewing this evolution of § 1981, the district court turned to the question of the appropriate statute of limitations for claims brought under § 1981. The court acknowledged that courts considering claims under § 1981 historically have applied the personal injury statute of limitations of the forum state. *See id.* However, the court believed that "this well-settled proposition was altered by Congress' enactment on December 1, 1990 of 28 U.S.C. § 1658, the federal 'catch-all' statute of limitations." *Id.* Section 1658 provides in relevant part: "Except as otherwise provided by law, a civil action arising under an Act of Congress

enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a).[4] Noting that § 1658 applies to any "civil action arising under an Act of Congress enacted" after December 1, 1990, the district court took the view that "An Act of Congress enacted" was not "susceptible to more than one reasonable interpretation." R. 244 at 8 (internal quotation marks omitted).

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[4] Until July 30, 2002, § 1658 only consisted of the quoted language. However, on that date, Congress amended § 1658 by designating the quoted language as subsection (a) and adding subsection (b) which provides:

> Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of --
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 § 804(a), 116 Stat. 745, 801 (2002). Nothing in the amendment affects the language of now subsection (a) or the analysis of that subsection contained in this opinion.

"Enact" means "to make into law by authoritative act," Black's Law Dictionary 546 (7th ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted." To the extent there could ever be any doubt about whether the Civil Rights Act of 1991 was "an Act of Congress" or whether it was "enacted," the language of the law itself should set the record straight.

Id. (internal citations omitted). The court went on to note that the preamble to the Civil Rights Act of 1991 both defines it as "An *Act* to amend the Civil ,Rights Act of 1964 . . ." and also begins with "Be it *enacted* . . . ." *Id.* (emphasis in original and internal quotation marks omitted). The court also found it unambiguous that "arising under" meant "stemming from" or "originating in." *Id.* (internal quotation marks and citations omitted). The court concluded that the meaning of § 1658 was that "whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action." *Id.*

The court then applied its interpretation of § 1658 to the facts presented. The court stated that § 1981 claims allowed by *Patterson* "clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date, and the catch-all statute does not apply to such claims." *Id.* at 8-9. However, "claims that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658." *Id.* at 9. Therefore, the district court concluded that § 1658 applies to that latter class of claims.

The court acknowledged that its decision was contrary to the only court of appeals decision to address the issue, *see Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3d Cir. 2000), as well as the majority of the district courts. Quoting the Third Circuit, the district court read *Zubi* as based on the rationale that Congress, in enacting the 1991 legislation, had chosen "to build upon a statutory text that has existed since 1870," and therefore "Zubi's civil action arises under an Act of Congress enacted before December 1, 1990, and is governed by New Jersey's two-year statute of limitations." R. 244 at 5 (quoting *Zubi*, 219 F.3d at 225-26). The district court could not "imagine how this [was] possible," because "in *Patterson*, the United States Supreme Court clearly held that claims such as those asserted by *Zubi* (discriminatory firing) *did not* arise under the pre-1991 version of § 1981." R. 244 at 5. The district court then summarized its holding:

> The Court finds that 28 U.S.C. § 1658 is unambiguous and, by its terms, applies to all claims arising out of the Civil Rights Act of 1991, which was enacted after December 1, 1990, the date on which § 1658 was enacted. Section 1658, by its terms, does not apply to claims arising under the pre-1991 version of § 1981; these claims continue to be governed by the most analogous state law statute of limitations, here, Illinois' two-year personal injury statute of limitations.

So what does this mean for the parties in this case? It is clear that claims asserted by Class 1 (the wrongful termination/failure to transfer claims) and Class 3 (the hostile work

> environment claims) arise under the 1991 Act, and are therefore governed by § 1658's four-year statute of limitations. . . . *Id.* at 10-11 (internal citations omitted).

C.

After the district court issued its memorandum opinion, Donnelley requested that the court certify the issue of the appropriate statute of limitations for immediate review. Determining that the criteria for an immediate appeal pursuant to 28 U.S.C. § 1292(b) had been met, the district court granted the defendant's motion to certify the following question:

> Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the "catch-all" four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state.

R. 248 at 2. By order of August 21, 2001, this court allowed Donnelley to pursue its appeal.

II DISCUSSION

To determine the appropriate statute of limitations, we must interpret two federal statutes; accordingly, we review the district court's interpretation de novo. *See, e.g.,*

Zambrano v. Reinert, 291 F.3d 964, 968 (7th Cir. 2002) (reviewing question of statutory and constitutional interpretations de novo); *see also Zubi*, 219 F.3d at 221 (reviewing de novo the question of the appropriate statute of limitations for § 1981 actions after the enactment of § 1658).

Prior to the enactment of § 1658, it was clear that the proper statute of limitations for § 1981 actions was the forum state's statute of limitations for personal injuries. *See Smith v. City of Chicago Heights*, 951 F.2d 834, 837 n. 1 (7th Cir. 1992) (citing *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-64, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987)). The plaintiffs maintain, however, that three intervening judicial and legislative events have occurred that alter the existing rule. First, the Supreme Court held in *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989), that § 1981 only granted two discrete rights: the right to make contracts, which "extends only to the formation of a contract, but not to problems that may arise later from conditions of continuing employment," and the right to enforce contracts, which "embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Id.* at 176-77. Second, in 1990, Congress enacted a uniform catch-all statute of limitations that provided a four-year statute of limitations for "civil actions arising under an Act of Congress" enacted after the effective date and for which a specific statute of limitations was not provided. Third, Congress amended § 1981 by way of the Civil Rights Act of 1991; specifically, it redefined "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the

contractual relationship." 42 U.S.C. § 1981(b). Because their actions "arise under" the 1991 Civil Rights Act, § 1658 provides the applicable statute of limitations.

In reply, Donnelley submits that Congress intended § 1658 to apply only to wholly new causes of action and not those built upon existing statutory schemes. According to Donnelley, "neither the statutory language of § 1658 nor this Court's jurisprudence on statutory interpretation sanctions" the plaintiffs' reading of § 1658. Appellant's Br. at 6. We shall consider these arguments below.

As with any statutory interpretation question, determination of the meaning and application of § 1658 to the § 1981 claims at issue must begin with the statutory language of both provisions. *See Masters v. Hesston Corp.*, 291 F.3d 985, 989 (7th Cir. 2002) ("The interpretation of a statute is a question of law, which we review *de novo.*"). Prior to the adoption of the Civil Rights Act of 1991, § 1981 stated:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1990). Until the Supreme Court's decision in *Patterson*, courts generally interpreted § 1981 to

encompass causes of action for race discrimination that occurred at any point during the employment relationship. *See, e.g., Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1430 (7th Cir. 1986) (upholding jury verdict of discriminatory treatment and termination under § 1981). However, the Supreme Court in *Patterson* held that § 1981 should be interpreted more narrowly:

> The conduct which petitioner labels as actionable racial harassment is postformation conduct by the employer relating to the terms and conditions of continuing employment. . .
>
> This type of conduct, reprehensible though it be if true, is not actionable under § 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process.

Patterson, 491 U.S. at 179. As part of the Civil Rights Act of 1991, Congress enacted an amendment to § 1981 that "reversed" the *Patterson* decision. Specifically, Congress added a subsection to § 1981 that defined "make and enforce contracts" broadly; the current version of § 1981 states:

> § 1981. Equal rights under the law
>
> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce

contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (emphasis added). Consequently, under the amended § 1981, an employee may bring a cause of action against his employer for discriminatory conduct that occurs after the employment relationship is formed.

Section 1981 does not contain its own statute of limitations. Consequently, prior to § 1981's amendment in 1991, courts applied the most analogous state statute of limitations to actions brought under that section. *See*

Goodman v. Lukens Steel Co., 482 U.S. 656, 660, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987) ("Because § 1981 . . . does not contain a statute of limitations, federal courts should select the most appropriate or analogous state statute of limitations."). For actions brought in Illinois, this court has determined that Illinois' two-year statute for personal injury claims is most analogous. *See, e.g., Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 807 (7th Cir. 1999), *cert. denied*, 530 U.S. 1204, 147 L. Ed. 2d 233, 120 S. Ct. 2197 (2000) (applying Illinois' two-year statute of limitations for personal injury claims to a cause of action brought pursuant to § 1981).

The plaintiffs maintain that, at least with respect to § 1981 actions that were barred by the *Patterson* decision, 28 U.S.C. § 1658 now provides the applicable statute of limitations. We look therefore to the language of § 1658 to determine if it applies to any claims brought under § 1981. Section 1658 provides in relevant part: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a).

Certainly, the plaintiffs' claims are "civil actions." The central question therefore is whether their claims "arise under an Act of Congress enacted after the date of the enactment of this section." The district court equated "arising under" with "'stemming from' or 'originating in. '"R. 244 at 8 (quoting Black's Law Dictionary 102 (7th ed. 1999)). In the district court's view, claims prohibited by *Patterson*, "but which can be made only by virtue of § 1981(b), . . . clearly arise under the Civil Rights Act of 1991. . . ." *Id.* In essence,

the district court believed that the plaintiffs' claims "arise under" the 1991 Civil Rights Act because, by virtue of *Patterson*, those claims could not have been brought prior to the passage of the 1991 Act.

We respectfully disagree, however, that the plain language of § 1658, standing alone, compels the conclusion that § 1658 must apply to every statute subject to any amendatory action by Congress. The language of § 1658 addresses only a "civil action" that "arises under" an act adopted after § 1658's effective date. The language simply does address the eventuality when a cause of action "arises under" two different "Acts," one enacted before and one enacted after the effective date of § 1658. Consequently, we must look not only at the language of § 1658 and § 1981, but also the structure and history of those statutes to determine whether § 1658 provides the applicable statute of limitations for the plaintiffs' claims. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 326-27 (7th Cir. 1995) (stating that a court may look beyond the text of a statute where the language is ambiguous, where a literal interpretation would lead to "absurd results" or where a literal interpretation would "thwart the goals of the statutory scheme").

At the outset of our inquiry, we remain focused on the language and structure of § 1658. By its terms, § 1658 applies to civil actions "arising under an Act of Congress *enacted* after the date of the enactment of this section . . . ." 28 U.S.C. § 1658 (emphasis added). As noted by one of our sister circuits, "the phrase 'an Act of Congress enacted' after 1990 is not equivalent to the phrase 'an Act of Congress enacted or amended' after that year." *Madison v. IBP, Inc.*,

257 F.3d 780, 798 (8th Cir. 2001), *vacated on other grounds*, 122 S. Ct. 2583 (2002).[5] "Amendments vary in their purpose, and the line between an amendment that modifies an existing right and one that creates a new right is often difficult to draw." *Zubi v. AT&T Corp.*, 219 F.3d 220, 224 (3d Cir. 2000). The difficulty in discerning a technical from a substantive amendment, or an amendment that modifies an

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[5] In *Madison v. IBP, Inc.*, 257 F.3d 780, 798 (8th Cir. 2001), *vacated on other grounds*, 122 S. Ct. 2583 (2002), the plaintiffs had brought Title VII claims as well as § 1981 claims. With respect to the plaintiffs' Title VII claims, the Eighth Circuit ruled that because Title VII has a 300 day limitations period, the district court should have instructed the jury that Madison could only recover damages under Title VII for illegal acts occurring within the 300 day period prior to the filing of her administrative charge. Since Madison filed her charge on January 13, 1995, she was entitled to recover damages under Title VII only for acts of discrimination or harassment occurring after March 19, 1994. The court therefore erred in instructing the jury that she could recover punitive damages under Title VII for illegal acts occurring after January 13, 1993.

Id. at 797. However, in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2077 (2002), the Supreme Court held that "[a] charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." It was in light of its decision in *Morgan* that the Supreme Court vacated the decision of the Eighth Circuit in *IBP*. *See Madison v. IBP, Inc.*, 153 L. Ed. 2d 773, 122 S. Ct. 2583 (2002). The Supreme Court did not pass judgment on, or otherwise call into question, the Eighth Circuit's reasoning with respect to the § 1981 claim.

existing civil action from one that creates a wholly new one, has led two of our sister circuits to reject a reading of § 1658 that would call for such guess work. According to the Eighth Circuit, "when Congress amends a preexisting statute, it does not create a 'new act, 'and claims arising under the statute as amended continue to arise under the preexisting statute. It is, thus, only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Id.* at 225.

The purpose behind § 1658 confirms the significance of the distinction drawn by the Eighth Circuit. In enacting this section, Congress sought to alleviate the uncertainty inherent in the practice of borrowing analogous state statutes of limitations for federal causes of action that do not contain their own limitations periods:

> At present, the federal courts "borrow" the most analogous state or federal law limitations period for federal claims lacking limitations periods. This practice creates a number of practical problems. As pointed out by the Study Committee:
>
> It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitations periods.

H.R. Rep. No. 101-734, at 24. Notably, Congress also was concerned with disrupting litigants' settled expectations and therefore made § 1658 prospective. This concern is reflected in the House Report as well:

> Section 111 addresses this problem by creating a four-year fallback statute of limitations, applicable to legislation enacted after the effective date of this Act, which creates a cause of action but is silent as to the applicable limitations period.
>
> Witnesses testifying on behalf of the Department of Justice and the Judicial Conference, urged that this section be made retrospective, so as to provide a fallback statute of limitations for previously enacted legislation lacking a limitations period. As witness George Freeman noted at the hearing, however, with respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties. Given that settling the expectations of prospective

> parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs.

Id. We believe that Donnelley's proposed interpretation of § 1658 is most compatible with this interest in certainty and in honoring settled expectations. Under this approach, plaintiffs do not have to guess whether their action arose under the original enactment or its amendment. Section 1658, therefore, applies only when an act of Congress creates a wholly new cause of action, one that does not depend on the continued existence of a statutory cause of action previously enacted and kept in force by the amendment.

The plaintiffs maintain that their proposed interpretation of § 1658 provides certainty and, at the same time, does not disrupt litigants' expectations. According to the plaintiffs, because the type of claims on which they seek relief did not exist post-*Patterson* and pre-§ 1981(b), there are no settled expectations to disrupt with respect to the statute of limitations to apply to such claims. "At first blush," the plaintiffs' interpretation does appear "to promise a fair degree of certainty in application"; if the newly enacted statute created a cause of action that did not exist previously, then § 1658 applies. *Zubi*, 219 F.3d at 224. "But that promise," as the Third Circuit has explained, "upon reflection, seems to us illusory." *Id.*

> First, as we have pointed out, [this] interpretation results in different statutes of limitations being applied to plaintiffs suing

> under the same statute depending on the particular facts of their claims. Thus, for example, plaintiffs who invoke § 1981 because they have been victims of discrimination in hiring will have their claims governed by one statute of limitations, while plaintiffs who invoke the same statute because they are victims of a discriminatory discharge will have their claims governed by another. Adoption of such an interpretation would seem to us to generate exactly the kind of confusion and unfairness that Congress sought to avoid.
>
> Recognition of two classes of plaintiffs under § 1981, when applied in a state with a statute of limitations for § 1981 claims larger than four years, is likely to result in unsuspecting plaintiffs who have relied on established precedent finding themselves barred from relief. Conversely, recognizing two classes, when applied in a state with a statute for § 1981 claims shorter than four years, is likely to result in defendants finding themselves faced with potential liability on claims they believed extinguished.

Id.

We believe that the Third Circuit's interpretation is most consonant with the purpose of § 1658 and the balance struck by Congress between the need for uniformity and the need to preserve settled expectations. Under this formulation,

> when an Act of Congress passed after December 1, 1990, amends a statute existing before that date, as opposed to creating a new law without reference to previously existing statutory language, all claims accruing after the passage of the amendment arise under an Act of Congress enacted before December 1, 1990, without regard to whether an identical claim arising earlier could have been successfully pursued under the prior statute.

Zubi, 219 F.3d at 222. Thus, it is "only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Id.* at 225.

We now turn to the language, structure and history of § 1981 to determine whether, given the manifest intent of Congress in enacting § 1658, it is appropriate to apply the applicable state statute of limitations or the federal catch-all provision. We again begin with the language and the structure of the statute. The most salient feature of the revised statute is that § 1981(b) simply cannot stand on its own. An action to recover for discriminatory post-formation treatment simply cannot be based solely on § 1981(b). Indeed, without § 1981(a), § 1981(b) is meaningless. Consequently, although post-formation discriminatory claims depend on the amendatory language of § 1981(b) in the sense that the definitional language of that subsection makes clear that "make and enforce" includes post-formation conduct, the cause of action for post-formation conduct "arises under" § 1981(a); that subsection, not subsection (b), provides the actual right to recovery.

That this structural formation of the revised § 1981 is no accident is clear when we turn to the history of the amendment. There is no question that reversing the *Patterson* decision was the driving force behind the enactment of § 1981(b). *See* H.R. Rep. No. 102-40 (I), at 88-92 (1991) (explaining the need to overrule *Patterson* and that the act "would overrule *Patterson* by adding at the conclusion of section 1981 a new subsection (b)"). Notably, Congress chose to overrule *Patterson* not by creating an entirely new statutory provision. Indeed, Congress did not alter the original language of § 1981 (now § 1981(a)), which provides the basic right of recovery for an individual whose constitutional rights have been violated; instead, Congress merely supplied a more precise definition to one of the rights already guaranteed by § 1981 -- the right "to make and enforce contracts." Congress could have overruled *Patterson* in a number of ways. Instead of creating a wholly new cause of action, Congress merely defined the term "make and enforce contracts" for the purpose of the old § 1981, now § 1981(a). Congress' action therefore evinces a desire to tie the new cause of action to the existing § 1981.

Moreover, it is highly significant that, when Congress passed the Civil Rights Act of 1991 with the amendments to § 1981 contained therein, it believed that the applicable state statute of limitations for personal injury claims would continue to apply to § 1981 claims:

> But under 42 U.S.C. section 1981, which bars intentional race discrimination in employment as well as other contractual relations, victims have a longer period of time to commence suits. In the absence of an express limitations

> period in section 1981, courts applying the statute have looked to analogous state statutes of limitations. These statutes typically allow two or three years, and allow up to six years in some states.

H.R. Rep. No. 102-40 (I), at 63 (1991). Consequently, although Congress had enacted § 1658 the year before, it did not view its passage as having altered the practice of borrowing state statutes of limitations for purposes of § 1981.

Finally, we also are persuaded by the considered opinions of two of our sister circuits that adopted the approach set forth here. In *Zubi* and *IBP*, the Third and Eighth Circuits both concluded that § 1658 did not affect the statute of limitations for § 1981 claims such as those brought by the plaintiffs. Those courts determined that it is "only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Zubi*, 219 F.3d at 225; *IBP*, 257 F.3d at 798 (quoting same). Because "the Civil Rights Act of 1991 was not the type of enactment Congress intended to include in the § 1658 four year limitations period," those courts applied the personal injury statute of the forum state. *IBP*, 257 F.3d at 798. We join those circuits in determining that § 1658 does not provide the applicable statute of limitations for claims of discrimination based on actions occurring after the employment relationship is formed.[6] Instead, the statute of limitations for those claims,

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[6] For the reasons set forth in this opinion, we respectfully disagree with the decision of the Tenth Circuit in *Harris v. Allstate Insurance Co.*, 2002 U.S. App. LEXIS 16509, 2002 WL 1874825 (10th Cir. Aug. 15, 2002). In *Harris*, the Tenth Circuit drew

as for all § 1981 claims, remains the most analogous statute of limitations, here Illinois' two-year statute of limitations for personal injuries.

Conclusion

28 U.S.C. § 1658, as it applies to claims brought pursuant to § 1981, is susceptible to more than one textually plausible reading. Based on the text, the structure of the statutes and the legislative history of those sections, we conclude that § 1658 does not apply to the plaintiffs' claims brought pursuant to § 1981. Consequently, the judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. Donnelley may recover its costs on this appeal.

REVERSED AND REMANDED

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heavily from the analysis of the district court in the present case and also of the dissenting judge in *Zubi*. Specifically, relying on the district court's reasoning that the Civil Rights Act of 1991 was an "Act of Congress enacted" after December 1, 1990, the Tenth Circuit held that " § 1658 applies to claims brought under § 1981(b), but not to claims brought under § 1981(a)." 2002 U.S. App. LEXIS 16509, [WL] at *6-9. As noted above, however, we do not believe the plaintiffs' claims "arise under" only § 1981(b), and, therefore, courts must look to the text, structure and purpose of both § 1981 and § 1658 to determine the correct statute of limitations. When this more complete context is considered, we believe that the correct statute of limitations for all § 1981 actions is the closest analogous state statute of limitations.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 98 C 4025, Case No. 96 C 7717

[Filed June 8, 2001]

JONATHAN ADAMS, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY & SONS, a Delaware Corporation,
Defendants.

EDITH JONES, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY & SONS,
Defendant.

JUDGES:
MATTHEW F. KENNELLY, United States District Judge.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

In these consolidated suits, the plaintiffs, current and former African-American employees of R.R. Donnelley & Sons, a printer and provider of information services and logistics, allege employment discrimination in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a) & 3(a). The Court recently certified three classes of plaintiffs: the first consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division"; the second consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1992 to the present as non-regular employees (including temporary, casual, contract, contingent, task force, etc.)"; and the third consists of "All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Chicago Financial Division; or (c) the Chicago Manufacturing Division from November 1992 to the present and were subject to racial harassment so pervasive as to create a hostile working environment." *See Adams v. R.R. Donnelley*, 2001 U.S. Dist. LEXIS 4247, *69, Nos. 98 C 4025, 96 C 7717, *2001 WL 336830,* at *20 (N.D. Ill. Apr. 6, 2001).

The parties have urged the Court to consider and resolve a single issue--the appropriate statute of limitations to be applied to plaintiffs' claims--arguing that resolution of this issue will in turn govern how the parties proceed on summary judgment and ultimately at trial. As framed by the parties, the

question presented is whether the appropriate statute of limitations is the four-year period contained in 28 U.S.C. § 1658 (what has been referred to as the federal "catch-all" statute of limitations) or the two-year statute of limitations that governs personal injury actions in Illinois.

FACTUAL BACKGROUND

This is not the first time the statute of limitations issue has been raised in this case. Before the cases were consolidated, Donnelley moved for partial summary judgment in the *Jones* case on the ground that the claims relating to its Chicago Manufacturing Division and the claims of many of the named plaintiffs were time-barred, filed after the expiration of what Donnelley argued was the applicable statute of limitations: Illinois' two-year personal injury statute of limitations. The plaintiffs opposed the motion, arguing (among other things) that the applicable statute of limitations was the four-year catch-all period contained in § 1658. Magistrate Judge Ian Levin concluded that § 1658, by its plain language, applied only to Acts of Congress *enacted* after December 1990, not Acts *amended* after December 1990, *Jones v. R.R. Donnelley*, 1999 U.S. Dist. LEXIS 1592, No. 96 C 7717, 1999 WL 33257839, at *9 (N.D. Ill. Feb. 11, 1999); because "the addition of Section 1981(b) was merely an amendment to Section 1981, which occurred after the enactment of Section 1658," Judge Levin reasoned, § 1658 did not apply to the plaintiffs' claims. *Id.* Judge Levin therefore recommended that Judge Williams grant Donnelley's motion for partial summary judgment with respect to all claims relating to the operation and shutdown of

the CMD and all the named plaintiffs identified and designated by the defendant in its motion. *Id.* at *12.

The plaintiffs objected to the magistrate's report and recommendation, Donnelley responded, and ultimately Judge Williams denied the summary judgment motion, though she did so on non-statute-of-limitations grounds and indeed stated that the Court "expressed no opinion on the correctness of Judge Levin's analysis of . . . the applicability of 28 U.S.C. § 1658's four-year statute of limitations to actions brought under 42 U.S.C. § 1981 (b)." *Jones v. R.R. Donnelley, 1999 U.S. Dist. LEXIS 1592,* No. 96 C 7717, *1999 WL 639180,* at *2 (N.D. Ill. Aug. 17, 1999). In short, we are essentially writing on a clean slate on the statute of limitations issue, though, as discussed below, we are hardly the first court to consider the question.

DISCUSSION

Before 1991, § 1981 read as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The statute, as then written, protected just two rights: the right to make contracts, which "extended only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment," and the right to enforce contracts, which "embraced protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989). The Civil Rights Act of 1991, which became law (i.e., was enacted) on November 21, 1991, revised § 1981, making the above-quoted language subsection (a) and adding two more subsections: subsection (b), which defined "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"; and subsection (c), which made the section applicable to private entities. In other words, the version of § 1981 in the 1991 Act created new causes of action that were not cognizable under the pre-1991 version of the statute.

Because § 1981 does not contain a statute of limitations, courts considering claims under § 1981 for civil rights violations historically have applied the state personal injury statute of limitations, *see Goodman v. Lukens Steel Co.*, 482 U.S. 656, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987); *Reed v. United Transp. Union*, 488 U.S. 319, 323-24, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989), which in Illinois is two years, 735 ILCS 5/13-202. The question for the Court is whether this well-settled proposition was altered by Congress' enactment on December 1, 1990 of 28 U.S.C. §

1658, the federal "catch-all" statute of limitations. Section 1658 provides that "except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

Looking at the plain language of § 1658, this seems to this Court to be an easy question to answer, though judging by the panoply of ways in which the question has been framed and answered this is apparently a minority view. The Seventh Circuit has yet to address the question of whether § 1658 governs claims brought under the 1991 Act; in fact only one circuit court, the Third, has actually considered, analyzed and answered the question. In *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3rd Cir. 2000), the court held that § 1658 applies "only when Congress establishes a new cause of action without reference to preexisting law. . . ." Thus, because Congress "chose to build upon a statutory text that has existed since 1870," the court held, "Zubi's civil action arises under an Act of Congress enacted before December 1, 1990, and is governed by New Jersey's two-year statute of limitations." *Id.* at 226. The Court cannot imagine how this is possible; in *Patterson*, the United States Supreme Court clearly held that claims such as those asserted by Zubi (discriminatory firing) *did not* arise under the pre-1991 version of § 1981. *See Patterson*, 491 U.S. at 177 ("the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established . . . ."). Rather, such claims can be made only by virtue of Congress' 1991 enactment of § 1981(b).

The Sixth Circuit has acknowledged that this issue exists, though it has not yet decided whether § 1658 actually applies to § 1981 claims. In one case, the district court applied Kentucky's personal injury statute of limitations to the plaintiff's § 1981 claims without considering § 1658, and the Sixth Circuit remanded with instructions to do so. *Young v. Sabbatine*, 1998 U.S. App. LEXIS 5774, No. 97-5169, 1998 WL 136559, at *3 (6th Cir. March 19, 1998). On remand, the district court found that § 1658 governed the claims, and although the parties tried to argue the issue on appeal, the Sixth Circuit concluded that it lacked jurisdiction to consider the question because the party with standing to do so failed to file a notice of cross-appeal. *Young v. Sabbatine*, 2000 U.S. App. LEXIS 33891, *6, No. 99-6336, 2000 WL 1888672, at *2 n.2 (6th Cir. Dec. 19, 2000).

The Tenth Circuit, interestingly, has applied the state's personal injury statute of limitations to § 1981 claims without so much as discussing the possibility that § 1658 might come into play, *see Reynolds v. School District No. 1, Denver, Colorado*, 69 F.3d 1523 (10th Cir. 1995); *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098 (10th Cir. 1998), which seems odd given that a number of district courts in that circuit *have* considered and resolved the issue--to conflicting ends. *Compare Alexander v. Precision Machining, Inc.*, 990 F. Supp. 1304 (D. Kan. 1997) (holding that § 1658 applies to claims arising out of the 1991 Act), *with Mason v. Anadarko Petroleum Corp.*, 1998 U.S. Dist. LEXIS 4745, No. 97-1051, 1998 WL 166562 (D. Kan. 1998); *Lasley v. Hershey Foods Corp.*, 35 F. Supp. 2d 1319 (D. Kan. 1999); and *Hall v. Flightsafety International, Inc.*, 106 F. Supp. 2d 1171 (D. Kan. 2000) (all holding that § 1658 does not apply

to § 1981 claims, even those arising under the 1991 Act). The Tenth Circuit *has* considered § 1658's impact in the context of a § 1983 claim, however, and concluded that the statute would not apply because the 1996 amendment to § 1983--which merely added a right to seek injunctive relief--did not create a cause of action. *See Laurino v. Tate, 220 F.3d 1213, 1217-18 (10th Cir. 2000)*. Applying this reasoning to § 1981, one would think the Tenth Circuit would conclude that § 1658 would apply to claims arising under § 1981(b), a post-§ 1658 enactment that *does* create a cause of action--though this is by no means a foregone conclusion.

In addition to these circuit court cases, there are about twenty-five district court decisions on the issue. A catalogue of these decisions is recounted and summarized in many of the decisions, and we will not reiterate it here. Suffice it to say, the courts have split on the issue: some (the majority) have held that § 1658 does not apply to any § 1981 claim, whether arising under the Civil Rights Act of 1991 or under the pre-1991 version of the statute, *see, e.g., Coleman v. Shoney's, Inc.*, 145 F. Supp. 2d 934, 2001 WL 526673 (W.D. Tenn. 2001); *Lane v. Ogden Entertainment, Inc.*, 13 F. Supp. 2d 1261, 1269 (M.D. Ala. 1998); *Hall*, 106 F. Supp. 2d 1171; *Hardin v. CNA Insurance Companies*, 103 F. Supp. 2d 1091 (S.D. Ind. 1999); some have held that § 1658 applies to all § 1981 claims, whether arising under the Civil Rights Act of 1991 or under the pre-1991 version of the statute, *see Rodgers v. Apple South, Inc.*, 35 F. Supp. 2d 974 (W.D. Ky. 1999); *Miller v. Federal Express Corp.*, 56 F. Supp. 2d 955 (W.D. Tenn. 1999); and some have concluded that § 1981 claims may be governed by both § 1658 and the applicable state personal injury statute of limitations,

depending on whether the particular claim arises under the 1991 Act or a pre-1991 version of the Act, *see Alexander*, 990 F. Supp. 1304; *see also MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 1998 U.S. Dist. LEXIS 4458, No. 97 C 2225, 1998 WL 156674 (N.D. Ill. March 31, 1998) (same result as applied to the Telecommunications Act of 1996). We think the last holding is the only one true to the language of the statute.

Judicial inquiry into the applicability of [§ 1658] begins and ends with what [§ 1658] does say and with what [§ 1658] does not." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992). Section 1658 applies to any "civil action arising under an Act of Congress enacted" after December 1, 1990. We see nothing ambiguous in this language, at least as it relates to the claims at issue in this lawsuit. First, although some courts have found otherwise, *see, e.g., Coleman*, 145 F. Supp. 2d 934, 2001 WL 526673, at *4; *Lane*, 13 F. Supp. 2d at 1270; *Davis v. State of California Department of Corrections*, 1996 U.S. Dist. LEXIS 21305, *57, No. S-93-1307DFL GGH, 1996 WL 271001, at *18-*19 (E.D. Cal. 1996), we do not think the statute's reference to "an Act of Congress enacted" is susceptible to more than one reasonable interpretation. "Enact" means "to make into law by authoritative act," Black's Law Dictionary 546 (7th ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted." *See also Rodgers*, 35 F. Supp. 2d at 976 ("All legislative actions of Congress, regardless of form, become law through an enactment by Congress and approval by the President."). To the extent there could ever be any doubt about whether the

Civil Rights Act of 1991 was "an Act of Congress" or whether it was "enacted," the language of the law itself should set the record straight. Congress specifically used both words in the law's preamble:

> An *Act* to amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.
>
> Be it *enacted* by the Senate and House of Representatives of the United States of America in Congress assembled, . . . Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (emphasis added).

Second, there is no question that "civil action" as used in § 1658 means "claim" or "cause of action." *See* David D. Siegal, *The Statute of Limitations in Federal Practice, Including the New 'General' One in Federal Question Cases*, 134 F.R.D. 481, 487 (1991). Finally, there is no question that "arising under" means "stemming from" or "originating in". *See Black's Law Dictionary* 102 (7th ed. 1999).

In short, the meaning of § 1658 is quite simple: whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action. As applied to § 1981, claims that under *Patterson* could be brought under the pre-1991 version of § 1981 clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date, and the catch-all statute does not apply to such claims. Claims

that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658. Section 1658 applies to those claims. Having concluded that the language of the statute is unambiguous, we need not consider the statute's legislative history. *See Germain*, 503 U.S. at 253-54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

The only other district judge in this Circuit who has addressed this issue concluded that § 1658 does not apply to any claims under § 1981, including claims given life by § 1981(b); it relied in part on legislative history that it read as indicating that Congress did not view the Civil Rights Act of 1991 as creating any new causes of action, but rather as "restoring" § 1981 to its proper scope following the Supreme Court's decision in *Patterson*. *Hardin*, 103 F. Supp. 2d at 1095. This Court does not agree. First, as indicated above, resort to legislative history is inappropriate where, as here, the language of the statute is unambiguous. But more importantly, whatever label Congress chose to give to its enactment, it was not "restoring" § 1981, it was changing it. "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803), and in *Patterson* the Supreme Court determined not that § 1981 should be narrowed despite its original intent, but rather that the statute, as enacted in 1866, was never meant to reach

certain forms of conduct. *Patterson*, 491 U.S. at 176-77. When Congress enacted § 1981(b), it thus undeniably created new causes of action, whether or not that is how it chose to label what it had done.

A number of courts have noted that our interpretation would result in courts applying two different statutes of limitations for every federal statute enacted prior to December 1, 1990 and amended thereafter to create new types of claims. *See, e.g., Coleman*, 145 F. Supp. 2d 934, 2001 WL 526673, at *5; *Davis*, 1996 U.S. Dist. LEXIS 21305, 1996 WL 271001, at *19. The answer to that is three-fold. First, the Court has not been asked to decide whether § 1658 governs every post-1990 legislative amendment; the Court must decide only whether the statute governs the claims raised by these plaintiffs in this lawsuit. Second, courts routinely apply different statutes of limitations to different claims, including different claims made within a single lawsuit. And third, even if applying multiple statutes of limitations is inconvenient, that is what Congress has required, and the courts are not at liberty to second guess an unambiguous statute.

To summarize, the Court finds that 28 U.S.C. § 1658 is unambiguous and, by its terms, applies to all claims arising out of the Civil Rights Act of 1991, which was enacted after December 1, 1990, the date on which § 1658 was enacted. Section 1658, by its terms, does not apply to claims arising under the pre-1991 version of § 1981; these claims continue to be governed by the most analogous state law statute of limitations, here, Illinois' two-year personal injury statute of limitations.

So what does this mean for the parties in this case? It is clear that claims asserted by Class 1 (the wrongful termination/failure to transfer claims) and Class 3 (the hostile work environment claims) arise under the 1991 Act, *see Patterson*, 491 U.S. at 176-77, and are therefore governed by § 1658's four-year statute of limitations. The claims asserted by Class 2, however, are not as easily drawn, and the parties are directed to sort out this question amongst themselves in light of the Court's ruling.

CONCLUSION

For the reasons explained above, the Court finds that the four-year statute of limitations in § 1658 governs those claims created by the Civil Rights Act of 1991; the state personal injury statute of limitations, which in Illinois is two years, governs those claims created by the pre-1991 version of § 1981. The Court will discuss with the parties at the upcoming status hearing how this determination may affect the various issues pending before the Court, including the scope of the respective classes and Donnelley's pending summary judgment motion.

Dated: June 8, 2001

MATTHEW F. KENNELLY
United States District Judge

APR 11 2003

No. 02-1205

IN THE

Supreme Court of the United States

EDITH JONES, *et al.*,

Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals correctly held that in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment and maintenance of a racially hostile work environment, the personal injury statute of limitations of the forum state applies rather than the "catch-all" four-year statute of limitations codified at 28 U.S.C. § 1658.

CORPORATE DISCLOSURE STATEMENT

R.R. Donnelley & Sons Company has no parent company and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioners ask this Court to reconsider a decision of the United States Court of Appeals for the Seventh Circuit which held that Illinois' two-year personal injury statute of limitations, rather than the federal "catch-all" four-year statute of limitations provided in 28 U.S.C. § 1658, applied to Petitioners' claims under 42 U.S.C. § 1981.

Petitioners, former employees of Defendant's Chicago Manufacturing Division ("CMD"), filed their action on November 25, 1996 alleging employment discrimination in violation of Section 1981. Petitioners' Complaint asserts (as do their Amended Complaints): "This action arises under . . . The Civil Rights Act of 1871, as amended by The 1991 Civil Rights Act (Section 1981(b)); . . ."

The District Court certified three classes according to the type of discrimination claimed:

> "Class 1" alleging discriminatory termination and denial of transfers in the shutdown of the CMD;
>
> "Class 2" alleging discriminatory assignment to non-regular jobs and denial of promotions to regular full-time jobs at the CMD while it was in operation; and
>
> "Class 3" alleging racial harassment at the CMD and two other Divisions.

Defendant filed a Motion for Summary Judgment seeking dismissal of all claims by former CMD employees (including all Class 1 and 2 claims and the harassment claims of former

CMD employees in Class 3) on the ground that their action was filed more than two years after their termination of employment in connection with the CMD closing and was therefore time barred by the two-year Illinois personal injury statute of limitations. The District Court denied the Motion, ruling that Section 1658 applied to the Class 1 termination and Class 3 racial harassment claims (but not, as explained below, to the Class 2 assignment and promotion claims).

Section 1658 provides that the "catch all" statute of limitations is to apply prospectively to federal civil actions "arising under an Act of Congress enacted" after Section 1658's effective date, December 1, 1990, which do not have their own express limitations periods. The District Court reasoned that Petitioners' Class 1 and 3 claims "arose under" the Civil Rights Act of 1991 because these claims were not viable under this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which limited the applicability of Section 1981's "make and enforce contracts" language to hiring, *i.e.* contract formation discrimination, but became actionable by virtue of the passage of the 1991 Act, which expanded the definition of the "make and enforce contracts" language to include other terms and conditions of employment, *i.e.* post contract formation discrimination. App. 36a-38a. The District Court declined to apply Section 1658 to the Class 2 assignment and promotion discrimination claims pending further development of the facts and briefing by the parties as to whether those might have been actionable under *Patterson* and before the 1991 Act. App. 40a.

At Defendant's request, the District Court certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) the following question:

> Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging discrimination in termination of

> employment, and maintenance of a racially hostile work environment [*i.e.*, the Class 1 and 3 claims], the appropriate statute of limitations is the 'catch-all' four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658 or the personal injury statute of limitations of the forum state.

The Court of Appeals for the Seventh Circuit granted Donnelley's Petition and reversed the District Court. The Seventh Circuit concluded that all of Petitioners' Section 1981 claims "arose under," as used in Section 1658, the original "make and enforce" language of the Civil Rights Act of 1866 and not the new definitional provision of Section 1981(b) added by the 1991 Act saying:

> We now turn to the language, structure and history of § 1981 to determine whether, given the manifest intent of Congress in enacting § 1658, it is appropriate to apply the applicable state statute of limitations or the federal catch-all provision. We again begin with the language and the structure of the statute. The most salient feature of the revised statute is that § 1981(b) simply cannot stand on its own. An action to recover for discriminatory post-formation treatment simply cannot be based solely on § 1981(b). Indeed, without § 1981(a), § 1981(b) is meaningless. Consequently, although post-formation discriminatory claims depend on the amendatory language of § 1981(b) in the sense that the definitional language of that subsection makes clear that "make and enforce" includes post-formation conduct, the cause of action for post-formation conduct "aris[es] under" § 1981(a); that

subsection, not subsection (b), provides the actual right to recovery. 305 F.3d at 717.

Finding that Petitioners' claims arose under a pre-existing statute, the Seventh Circuit held that Section 1658 did not apply and reaffirmed the long-standing application of the analogous personal injury statute of limitations of the forum state to Section 1981 claims.

Petitioner's petition for *rehearing* and *rehearing en banc* was denied by the Court of Appeals and this Petition ensued.

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit's Decision is Consistent with This Court's Decision in *Rivers v. Roadway*

Petitioners assert that the Seventh Circuit's decision conflicts "in principle" with this Court's decision in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). But Petitioners fail to articulate exactly where the alleged conflict lies and there is none. *Rivers* holds that Section 101 of the Civil Rights Act of 1991, re-designating the preexisting Section 1981 as Section 1981(a) and adding the definitional Section 1981(b), does not apply retroactively. Although Petitioners assert that, in so holding, this Court "recognized . . . that § 1981(b) created an entirely new cause of action," this Court did not. Rather, this Court found that "§ 101 operates as a gloss on the terms 'make and enforce contracts,' the original language of the Civil Rights Act of 1866" which has the effect of imposing "new legal obligations." 511 U.S. at 303-305.

As *Rivers*, 511 U.S. at 304, and its companion decision, *Landgraf v. USI Film Products*, 511 U.S. 244, 283 (1994), make clear, the focus in determining whether to apply a statute retroactively is on whether doing so would impose new legal liabilities and obligations on past conduct. This inquiry is the same regardless of whether the statute is characterized as creating a new cause of action or as an amendment of a preexisting cause of action. *Landgraf*, 511 U.S. at 283. Accordingly, it was unnecessary for this Court in *Rivers* to address whether Section 1981(b) creates an "entirely new cause of action" and it did not.

Nor does the Seventh Circuit's decision conflict with any "principle" emanating from *Rivers*. The Seventh Circuit readily recognized, in concert with *Rivers*, that Section 101 of the 1991 Act made viable certain Section 1981 claims not actionable under *Patterson*. But the Seventh Circuit was also correct in holding that, as a matter of common sense, as well as statutory history and structure, Petitioners' claims "arise under" – i.e. "stem from" or "originate in" to use the District Court's definition (citing Black's Law Dictionary (7th Ed. 1999) – the 1866 Act's original "make and enforce" language rather than the Section 1981(b) definitional "gloss." Indeed, Petitioners' own Complaint language, asserting their "action arises under . . . The Civil Rights Act of 1871, as amended by the 1991 Civil Rights Act (Section 1981(b) . . ." reflects this reality.

Nothing in *Rivers* conflicts with this ruling or analysis. *Rivers* simply does not speak to the statutory construction issue presented here. If anything, to the extent *Rivers*' denial of retroactive effect for Section 101 is based on a concern not to upset settled expectations, the Seventh Circuit's decision is entirely consistent in that it preserves the

longstanding precedent of applying the most analogous state statute of limitations for personal injury tort claims to Section 1981 claims. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987); *Vakharia v. Swedish Covenant Hospital*, 190 F.3d 799, 807 (7th Cir. 1997), *cert. denied*, 530 U.S. 1204 (2000).

II. The Seventh Circuit's Decision is Consistent with the Language and Purpose of Section 1658

Petitioners further assert that the Seventh Circuit's decision is at odds with the "plain meaning" of Section 1658's language. But 1658 provides no "plain" and unambiguous meaning on the only point that matters in this case: whether for purposes of determining the applicability of Section 1658 a cause of action should be deemed to "arise under" an Act of Congress enacted after Section 1658's effective date where an action, as Petitioners' Section 1981 claims here, arises under an Act enacted before Section 1658 but amended thereafter. *See, e.g., Robinson v. Shell Oil Company*, 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning *with regard to the particular dispute in the case*." (emphasis supplied)). As the Seventh Circuit correctly observed, Section 1658's language alone does not answer this question. 305 F.3d at 724, *Accord, Zubi v. AT&T Corp.*, 219 F.3d 220, 224 (3d Cir. 2000); *Madison v. IBP, Inc.*, 257 F.3d 780, 798 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 919 (2002).[1]

1. The Seventh Circuit also addressed and correctly ruled that the recent amendment to Section 1658 has no bearing on the issue presented in the instant Petition. 305 F.3d at 720 n.4. On July 30, 2002, Congress amended Section 1658 by adding a new subsection (Cont'd)

Because Section 1658 is equivocal, the Seventh Circuit appropriately turned to the structure, purpose and history of Section 1658, as well as Section 1981, to determine if Section 1658 applies to Section 1981 claims. As the Seventh Circuit recognized, Section 1658 was enacted to alleviate the uncertainty in the practice of borrowing analogous state statutes of limitations for federal causes of action without their own. But Congress stopped short of making Section 1658 applicable to all such federal causes of action accruing after Section 1658's effective date. Moreover, Congress clearly expressed why. Namely, it recognized that there was a well established precedent of borrowing state limitations periods for federal causes of action without their own limitations period and decided to preserve this body of law in the interest of avoiding the disruption of settled expectations based on that precedent:

> With respect to many statutes that have no explicit limitations provision, the relevant limitations

(Cont'd)
(b) which provides a statute of limitations for private rights of action claiming fraud under the Securities Exchange Act of 1934. As both the legislative history and the language of this amendment make clear, the new statute of limitations addresses and is designed to overturn this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 n.9 (1991), which ruled that an implied cause of action under Section 10(b) of the 1934 Act and Rule 10b-5 is subject to the statute of limitations in Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e). Contrary to Petitioners' contention, the amendment, therefore, does not address the case where a cause of action could be said to arise under two different statutes, one enacted before Section 1658 and the second thereafter. Likewise, absolutely nothing in the amendment's legislative history suggests Congress thought that § 1658 would otherwise apply to the long recognized Section 10(b) implied cause of action.

> period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to [different limitations periods] would threaten to disrupt the settled expectations of a great many parties.

H.R. Rep. No. 101-734, § 111 at 24 (1990).

Similarly, the legislative history surrounding the amendment of Section 1981 makes clear that Congress was well aware of the established precedent under Section 1981 of borrowing the limitations period from state personal injury statutes. *See* H.R. Rep. No. 102-40(I) at 63, *reprinted in* 1991 U.S.C.C.A.N. at 601; H.R. Rep. No. 102-40(II) at 22 n.32, *reprinted in* 1991 U.S.C.C.A.N. at 715-16 n.32. In fact, Congress cited this practice as a reason to lengthen the Title VII statute of limitations to two years to bring it more into harmony with the longer limitations periods applied to Section 1981 claims. *Id.*

It would be anomalous indeed for Congress to cite this precedent approvingly in connection with the passage of the 1991 Act while *sub silentio* abrogating the same precedent through the joint operation of the 1991 Act and Section 1658. The Seventh Circuit's holding that Petitioners' claims arise under the original "make and enforce" language thereby preserving the Section 1981 precedent of borrowing the analogous state statute of limitations gives faithful effect to the balance struck by Congress in its passage of Section 1658.

Furthermore, the Seventh Circuit's review of Section 1658's legislative history as an aid in construing the statute, in these circumstances, is entirely consistent with this Court's precedent cited by Petitioners. *Norfolk & Western Ry. Co. v. American Train Dispatchers*, 499 U.S. 117, 128 (1991); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Robinson v. Shell Oil Co.*, 519 U.S. at 340-41. Those decisions provide that statutory analysis should not go beyond the language of the statute where the language is clear and unambiguous in its application to the question at hand and where there is no clearly expressed legislative history to the contrary. Here, neither condition pertains. As demonstrated above, not only is Section 1658's language susceptible to alternative textually plausible interpretations, but also the one chosen by the District Court is contrary to Congress' clearly expressed intent.

But even without resort to the legislative history behind Section 1658's enactment and accepting, *arguendo*, the District Court's reading of "arising under," as demonstrated above, the Seventh Circuit rightly found that for purposes of Section 1658, the structure and evolution of Section 1981 make manifest that Petitioners' 1981 claims "arise under" the original "make and enforce" language, now codified as Section 1981(a), rather than the definitional Section 1981(b).

III. The Seventh Circuit's Decision is Consistent with Congress' Intended Application of Section 1658

Petitioners' additional contention that the Seventh Circuit's analysis will improperly limit Congress' intended reach of Section 1658 is based on a mischaracterization of the Seventh Circuit's ruling and constitutes rank speculation as to its

application in other situations. Petitioners assert that the Seventh Circuit held that Section 1658 applies "only when Congress establishes a new cause of action and does not apply to statutes that have 'roots in' or 'otherwise reference' laws that preexist Section 1658" (Petition, p. 4). From this faulty premise, Petitioners speculate that the Seventh Circuit's reading of Section 1658 would render the statute "a virtual dead letter" as to any amendment of an existing statute.

In fact, the Seventh Circuit spoke much more precisely than Petitioners contend, stating that in the context of a post Section 1658 amendment to a pre-existing cause of action, "Section 1658, therefore, applies only when an Act of Congress creates a wholly new cause of action, one that does not depend on the continued existence of a statutory cause of action previously enacted and kept in force by the amendment." 305 F.3d at 726. As elucidated above, given the structure and history of Section 1981, the Seventh Circuit correctly held that the 1991 Act did not create such a "wholly new cause of action" and therefore Section 1658 did not apply to Petitioners' claims. But how the Seventh Circuit's formulation of Section 1658 would be applied in other circumstances is pure conjecture. Petitioners' own example, the Telecommunications Act of 1996 (Petition, p. 11), belies their assertions of an inappropriately stunted application. That Act created for the first time a private right of action, codified at 47 U.S.C. § 252(e)(6), to enforce an entirely new regulatory scheme for negotiating and arbitrating interconnection agreements. There is nothing in the Seventh Circuit's reading of Section 1658 which would deny its application to the new cause of action in 42 U.S.C. § 252(e)(6). And, in any event, that question is not presented in this Petition.

IV. Neither 42 U.S.C. § 1988 Nor This Court's Decisions In *Wilson v. Garcia* and *North Star Steel Co. v. Thomas* Supports Review

Petitioners' assertion that this Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), and 42 U.S.C. § 1988 mandate the application of Section 1658 to Section 1981 claims begs the question at issue and offers no independent basis for granting certiorari. *Wilson* reaffirmed the "settled practice" of applying state limitations periods to federal civil rights causes of action which do not provide their own statute of limitations. 471 U.S. at 266-67. This Court went on to direct the lower courts to adopt state limitations periods only after first considering whether there is any applicable federal law. 471 U.S. at 267. As shown above, the Seventh Circuit did just that and applied the Illinois state personal injury statute of limitations only after correctly determining that Section 1658 does not apply.

This Court's decision in *North Star Steel Co. v. Thomas*, 515 U.S. 29 (1995), is not to the contrary. There, this Court reaffirmed the long-standing presumption of borrowing the most analogous state statute of limitations for federal causes of action without their own. In passing, this Court noted in a footnote that this presumption would be reversed for such statutes enacted after the effective date of Section 1658. 515 U.S. at 34 n.1. No issue of interpretation or application of Section 1658 was before this Court in *North Star Steel Co.*, let alone the issue presented here. In sum, neither *Wilson* nor *North Star Steel Co.* add anything to the analysis of whether Section 1658 applies to Section 1981 claims.

V. Review Is In Any Event Premature

As discussed above, the Seventh Circuit's decision is correct, consistent with this Court's precedent and faithful to the language, structure and history of both Sections 1658 and 1981. The decision, in short, presents no grounds for review. Nor is review warranted or advisable to resolve the current conflict among the Circuit Courts of Appeals.

At present, only four Courts of Appeals have ruled on whether Section 1658 rather than the appropriate state personal injury limitations period applies to claims under Section 1981. The Seventh Circuit, as well as the Third and Eighth Circuits, holds that Section 1658 does not apply. *See Zubi v. AT&T Corp.*, 219 F.3d 220 (3d Cir. 2000); *Madison v. IBP, Inc.*, 257 F.3d 780 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 919 (2002).[2] Only the Tenth Circuit, in *Harris v. Allstate Insurance Co.*, 300 F.3d 1183 (10th Cir. 2002), *rehearing* and *rehearing en banc denied* November 26, 2002, has held otherwise. A grant of review at this time is premature because this Court will benefit from further consideration of and elaboration on this issue by other Courts of Appeals. As Petitioners themselves point out, the other Courts of Appeals have not yet been presented with cases squarely raising the issue but, given the number of

2. In *Madison*, plaintiffs brought claims under Title VII of the Civil Rights Act of 1964, and Section 1981. This Court vacated the *Madison* decision in light of its decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), with respect to the Eighth Circuit's application of Title VII's statute of limitations to plaintiffs' Title VII harassment claims. This Court did not pass judgment on, or otherwise call into question, the Eighth Circuit's reasoning with respect to its holding that Section 1658 did not apply to plaintiffs' Section 1981 claims.

recent District Court decisions (many of which are cited by Petitioners), such consideration will almost certainly be forthcoming. Indeed, oral argument on the application of Section 1658 to Section 1981 claims was heard by the Fourth Circuit Court of Appeals on October 30, 2002 in the cases of *James v. Circuit City Stores*, Docket No. 02-1256, and *Moten v. Circuit City Stores*, Docket No. 02-1257. Moreover, oral argument on the same issue is set on May 13, 2003 before the Ninth Circuit Court of Appeals in *Abazly v. Pinnacle Nissan, Inc.*, Docket No. 02-15511.

Further development of the issue is particularly appropriate here. As the Third Circuit recognized in *Zubi*, 219 F.3d at 222, the District Courts have applied three interpretations of Section 1658's application to Section 1981 claims: (1) Section 1658 does not apply to any Section 1981 claims; (2) Section 1658 applies only to those Section 1981 claims which could not have been brought under *Patterson* and prior to the 1991 Act; and (3) Section 1658 applies to all Section 1981 claims. The Seventh, Third and Eighth Circuits have adopted the first reading; the Tenth Circuit has followed the second interpretation. Although, Defendant submits that subsequent rulings will confirm the correctness of the Seventh Circuit's position, denying review at this time will provide the opportunity for a more robust consideration of all three competing interpretations.

This case also is not an efficacious vehicle for resolving this conflict. Contrary to Petitioners' assertion, the District Court did not rule that all their claims were timely under Section 1658's four-year limitations period. Instead, the District Court reserved ruling on Petitioners' discriminatory assignment and promotion claims for further development of the facts and briefing on whether such claims would have

been actionable before the 1991 Act. Answering that question requires extensive factual and legal analysis under the District Court's formulation of Section 1658 because even after *Patterson* and before the 1991 amendment, the Seventh Circuit interpreted Section 1981 as allowing claims of promotion discrimination where the promotion would alter the contractual relationship between the employee and employer such as in a move from a casual to regular employee. *See, e.g., Harper v. Godfrey Co.*, 45 F.3d 143, 146-47 (7th Cir. 1995). Under the District Court's interpretation, if the former CMD employee promotion claims would have been cognizable under *Harper*, the state statute of li itations, not Section 1658, would apply.

Accordingly, granting review without an established record illuminating the application of the District Court's reading of Section 1658 to all claims would deprive this Court of a full assessment of whether that interpretation will further the objective of bringing a greater degree of certainty in applying state statutes of limitations to federal causes of action without their own.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be denied.

Respectfully submitted,

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No. 02-1205

In the
Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED,
Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY,
A DELAWARE CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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1. Review of this issue is not premature

Respondent argues that this Court should not review Petitioners Writ of Certiorari firstly, because all of the Circuits have not weighed in on the issue[1] and secondly, because there are issues that the District Court still needs to rule on. These arguments are specious because respondent took the exact opposite position when seeking to certify this same question for appeal to the Seventh Circuit. The overwhelming rationale for granting the Writ is to put the question regarding the correct statute of limitations under section 1981 of the 1991 Civil Rights Act to rest, allowing Plaintiffs and Defendants across the country to stop litigating the time consuming and costly limitations issue and instead focus on the merits of the cases. As there is already a split in the circuits regarding this issue it is ripe for consideration by this Court.

In Respondent's "Motion to Certify Issue for Appeal" (before the District Court) respondent argued "this court's decision creates a split within this circuit, and it would be a further waste of scarce judicial resources for every district judge to decide the issue independently and (given the obvious differences of opinion so far) for at least some cases to require remand and retrial...." Now Respondent wants every circuit to decide the issue independently before the Supreme Court takes up the issue. In that same motion, Respondent also argued "resolution of the limitations period at this stage would therefore serve the dual purposes of judicial economy

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[1] *Abazly v. Pinnacle Nissan, Inc,* cited by Respondent as pending in the 9th Circuit was voluntarily dismissed by the parties on April 4th 2003 and therefore is no longer pending. The 5th Circuit cases cited by Respondent were argued six months ago and a decision is imminent.

and timely disposition of the central aspect of this litigation." Respondent obviously did not think it was premature for the Seventh Circuit to rule on the issue when it was Respondent who sought the appeal and Respondent did not ask the District Court to rule on any outstanding issues prior to seeking the District Courts certification of the question for review. Respondent's argument, which directly contradicts the arguments made by it to the District Court and the Seventh Circuit, should be given no weight.

2. Developments in this Court and in the lower courts since the filing of the Petition for Writ emphasize the importance of granting the Writ

In *Branch v. Smith* 2003 WL 1611449 (March 31, 2003) this Court again emphasized that "the most rudimentary rule of statutory construction...that courts do not interpret statutes in isolation, but in the context of the corpus juris of which they are a part, including later-enacted statutes". Because sections 1981 (a) and (b) of the 1991 Civil Rights were clearly intended as a substitute to the reconstruction era's Section 1981, the Seventh Circuit's interpretation is flawed and contrary to the long established canons of statutory construction reiterated by this Court. This approach clearly conflicts with this Court's rules of statutory construction as clarified in *Branch,* which makes clear that the laws should be read *in pari materia*. As discussed in Section 3 (n.1) of Plaintiffs' Writ the consequences of the statutory construction laid out in the Seventh and Third Circuits opinions will render Section 1658 a dead letter.

Although Petitioners question is limited to the application of Section 1658 to 42 U.S.C. § 1981, this Court's interpretation of that question will be guiding on other areas of the law. Despite respondent's assertions to the contrary

this is not a hypothetical argument. Since filing the Writ of Certiorari at least one additional statute has come under fire regarding the application of Section 1658 on statutes that have "their roots" in statutes that existed prior to the enactment of Section 1658. In *Rogers v. City of San Antonio* 2003 WL 1566502 (March 4, 2003) the district court found that the four year statute of limitations applied in cases filed under the Uniform Services Employment and Reemployment Rights Act of 1994 ("USERRA"), 38 U.S.C. § 4301, *et seq*.[2] Despite the fact that USERRA had it's roots in a previous law (VRAA) the District Court in *Rogers* (*Supra* at *7) rejected the statutory construction espoused by the Third and Seventh Circuits and found that the four year statute did apply to that amended statute.

In contrast, a recently published decision[3] out of the Eastern District of Tennessee found exactly the opposite in yet another USERRA case. In, *AKHDARY v. CITY OF CHATTANOOGA* 2002 WL 32060140 (May 22, 2002) that Court held that Section 1658 did not apply to Akhdary's

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[2] Similar to the Civil Rights Act of 1991, USERRA was the amended version of VRAA and was enacted by Congress in response to the United States Supreme Court decision in *Monroe v. Standard Oil* Co 452 U.S. 549 (1981). In the *Monroe* case, this Court found that the Vietnam Era Veterans' Readjustment Assistance Act of 1974, USERRA's predecessor statute, "was enacted for the significant purpose of protecting the employee/reservist against discrimination like discharge and demotion, motivated *solely* by reserve status." Thus, through the enactment of USERRA and specifically section 4311, Congress repealed the "sole cause" standard enunciated in *Monroe,* insisting instead on the "motivating factor" standard.

[3] This decision was actually handed down in May 2002 but not published by Westlaw until March 2003.

claims under USERRA. Relying on." *Zubi v. AT & T Corp.*, 219 F.3d 220, 225 (3d Cir.2000) the District Court found that Section 1658 did not apply because USERRA did not establish a new cause of action but instead, amended the preexisting law of the VRRA.

CONCLUSION

For the reasons set forth in Petitioners Petition for Writ of Certiorari and in this Reply and for such other reasons as this Court deems just and appropriate, Petitioners ask this Court to grant their petition for a Writ of Certiorari and find that the four-year statute of limitations set forth in 28 U.S.C. § 1658 applies to Section 1981 of the Civil Rights Act of 1991 and for such other and further relief as this Court deems just.

Respectfully Submitted,

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(8)

Supreme Court, U.S.
FILED
JUL 31 2003
CLERK

No. 02-1205

In the Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED,
Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY,
A DELAWARE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RECEIVED
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SUPREME COURT, U.S.

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 13, 2003
PETITION FOR CERTIORARI GRANTED MAY 19, 2003

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District Court – Memorandum Opinion and Order, Entered June 8, 2001 . . . . . App. 22

District Court – Defendants' Motion to Certify Issue for Appeal, filed June 27, 2001 . . . . App. 35

District Court – Plaintiffs' Response to Defendants' Motion to Certify, filed July 12, 2001 . . . App. 39

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Court of Appeals – Order Granting Petition for Leave to Appeal, entered August 21, 2001 . . . . . App. 75

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RELEVANT DOCKET ENTRIES

CIVIL DOCKET FOR CASE #: 96-CV-7717

Jones, et al v. R R Donnelley & Sons
Assigned to: Hon. Matthew F. Kennelly
Demand: $0,000
Lead Docket: None
Jurisdiction: Federal Question

Filed: 11/25/96
Jury demand: Both
Nature of Suit: 442
Jurisdiction: Federal Question

1	11/25/1996	COMPLAINT; jury demand - Civil cover sheet – Appearance(s) of Suzanne McCarthy, H. Candace Gorman as attorney(s) for plaintiffs with Rule 39 affidavit for H. Candace Gorman only (1 original and 1 copy summons(es) issued.) (Documents: 1-1 through 1-4) [Date Entered: 12/04/96, By: ip]
10	01/08/1997	MOTION by defendant for partial summary judgment and briefing schedule ; Notice of motion [Date Entered: 01/16/97, By: nln]
102	10/26/1998	RESPONSE by plaintiffs to defendant's motion for partial summary judgment [Date Entered: 11/06/98, By: mg]

108	11/05/1998	MEMORANDUM by defendant in support of motion for partial summary judgment [107-1] (Attachments) [Date Entered: 11/06/98, By: mg]
118	12/15/1998	REPLY memorandum by defendant in support of its motion for partial summary judgment [107-1] (Attachments) [Date Entered: 12/16/98, By: cmf]
149	08/16/1999	MINUTE ORDER of 8/16/99 by Hon. Ann C. Williams : Pursuant to memorandum opinion and order dated 8/10/99 the court denies Donnelley's motion for partial summary judgment. The court also denies plaintiffs' motion to strike. Status hearing set for 9/3/99 at 9:00 a.m. (Entered Memorandum Opinion and Order). Mailed notice [Date Entered: 08/17/99, By: mg]
201	12/22/2000	MOTION by defendant for partial summary judgment; Memorandum in support (Attachments). [Date Entered: 12/26/00, By: mw]
233	04/13/2001	MEMORANDUM by defendant in support of applying a two-year limitations period under 42 U.S.C. 1981 (Attachments) [Date Entered: 04/16/01, By: ip]

235	04/13/2001	SUMMARY of argument and update on authorities regarding the four-year statute of limitations by plaintiff; Notice of filing and certificate of service [Date Entered: 04/19/01, By: rm]
244	06/08/2001	MINUTE ORDER of 6/8/01 by Hon. Matthew F. Kennelly : The reasons set forth on the attached order, the Court finds that the four-year statute of limitations in Section 1658 governs those claims created by the Civil Rights Act of1991; the state personal injury statute of limitations, which in Illinois is two years, governs those claims created by the pre-1991 version of Section 1981. The Court will discuss with the parties at the upcoming status hearing how this determination may affect the various issues pending before the Court, including the scope of the respective [sic] classes and Donnelley's pending summary judgment motion. Entered Memorandum Opinion and Order. No notice [Date Entered: 06/15/01, By: rm]
245	06/27/2001	MOTION by defendant to certify issue for appeal [Date Entered: 06/28/01, By: rm]

246	07/12/2001	RESPONSE by plaintiffs to defendant's motion to certify issue for appeal [245-1]; Certificate of service and notice of filing [Date Entered: 07/13/01, By: rm]
247	07/17/2001	MINUTE ORDER of 7/17/01 by Hon. Matthew F. Kennelly : Status hearing held and continued to 12/5/01 at 9:30 am. Defendant's motion for partial summary judgment is withdrawn without prejudice [201-1]. Discovery cutoff setto [sic] 7/16/02. No further extensions. Mailed notice [Date Entered: 07/19/01, By: cm]
248	07/27/2001	MINUTE ORDER of 7/27/01 by Hon. Matthew F. Kennelly : Enter order. The court grants defendant's motion to certify [245-1] and certifies for appeal under 28 USC 1292(b) the order of 6/8/01, and specifically the following question: whether [sic] in a 1996 lawsuit brought under 42 USC 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statue of limitations is the "catch-all" four year period enacted by Congress in 1990 and codified at 28 USC 1658, or the personal injury statue of limitations of the [sic] forum state. (Entered Order.)

		No notice. [Date Entered: 07/30/01, By: ls]
253	08/02/2001	NOTICE OF APPEAL by defendant pursuant USCA order dated 8/21/01 from motion minute order [249-1] ($105.00 Paid) [Date Entered: 08/29/01, By: dj]
252	08/21/2001	COPY of Order dated 8/21/01 from the 7th Circuit. It is ordered that the petition for leave to appeal is granted.(01-8026) [Date Entered: 08/24/01, By: ls]
294	03/31/2003	MINUTE ORDER of 3/31/03 by Hon. Matthew F. Kennelly : Fairness / approval hearing held regarding proposed settlement of class action aspects of Adams case (98 C 4025). Settlement is approved. Claims of members of the Chicago [sic] Financial Division, Dwight, and Pontiac subclasses of Class 3 are dismissed with prejudice and without costs, and the members of those classes are barred from prosecution claims arising from the subject matter of the allegations underlying the class claims. The claims of Classes 1 and 2 and the Chicago Manufacturing Division subclass [sic] of Class 3, all of which are a part of the Jones case (96 C

7717), remain for adjudication. All other individual claims in both Adams and Jones cases are dismissed with prejudice, except for the individual claims of [sic] Larry Hill, Carolyn Richardson, and David Armstrong. This order is final and appealable within the meaning of Federal Rule of Civil Procedure 54(b). Mailed notice [Date Entered: 04/02/03, By: rm]

Seventh Circuit Court of Appeals Docket #: 01-3271

Court of Appeals Docket #: 01-3271 Filed: 8/29/01
Nsuit: 3442 Federal Question-Employment
Jones, Edith, et al v. R.R. Donnelley Sons
Appeal from: United States District Court

- -

Lower court information:

District: 0752-1 : 96 C 7717
Court Reporter: L. Brennan, Court Reporter
Ordering Judge: Matthew F. Kennelly, Judge
Date Filed: 11/25/96
Date order/judgment: 6/8/01
Date NOA filed: 8/21/01

8/29/01 Private civil case docketed. [01-3271] [1429963-1] Transcript information sheet due 9/10/01. Appellant's brief due 10/9/01 for R.R. Donnelley Sons. Docketing Statement due 8/28/01. (squi)

9/16/02 Filed opinion of the court by Judge Ripple. REVERSED and REMANDED. Circuit Judge Kenneth F. Ripple, Circuit Judge Michael S. Kanne, Circuit Judge Terence T. Evans. [01-3271] [1429963-1] (hard)

9/16/02 ORDER: Final judgment filed per opinion. Donnelley may recover its costs on this appeal. (hard)

9/27/02 Filed 30c Petition for Rehearing and Petition for Rehearing Enbanc by Appellee Ellis Jackson, Appellee Dorothy J. Epps, Appellee Virginia Clark, Appellee Eunice Young, Appellee Edith Jones. Dist. [01-3271] [1551705-1] (amyd)

11/21/02 ORDER: Appellee Ellis Jackson, Appellee Dorothy J. Epps, Appellee Virginia Clark, Appellee Eunice Young, Appellee Edith Jones Petition for Rehearing and Petition for Rehearing Enbanc is DENIED. [01-3271] [1551705-1] (tiff)

12/2/02 MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 5 vol. pleadings; 17 vol. loose pleadings; 15 vol. transcripts; 1 vol. exhibits;) [01-3271] [1453249-1] (stef)

Relevant Docket Entries

5/23/03	Filed order from the Supreme Court GRANTING the Petition for Writ of Certiorari. Supreme Court Case No.: 02-1205. [01-3271] [1626685-1] (amyd)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

CASE NO. 96 C 7717

[Filed February 7, 1997]

EDITH JONES, EUNICE YOUNG,)
VIRGINIA CLARK, DOROTHY JEAN EPPS,)
GWENDOLYN EVERETT, EVIE HAYDEN,)
ELLIS JACKSON, SR., ETHYL WILLIAMS,)
WILLIE MOORE, EDDIE MCGEE, JAMES)
NEVILS, JR., JOSEPH BEVILL, SR.,)
MARY BECKUM, CLARENCE BOLDS, EDITH)
BOWLES, CURTIS BROWN, TOM GRIFFIN,)
MARGIE HARRIS, MAURICE HAYES, ALBERT)
JACKSON, VENNIE LAWSON, RAYMOND LEWIS)
Representative Plaintiffs,)
)
VS.)
)
R.R. DONNELLEY & SONS,)
A DELAWARE CORPORATION,)
Defendant.)

JUDGE Williams
MAGISTRATE Bobrick

COMPLAINT

This suit is brought as a class action suit by current and former African American employees of RR Donnelley, to secure rights for violations of 42 USC 1981 of the Civil

Rights Act of 1871, as amended, and as amended by the 1991 Civil Rights Act (1981b), for the intentional and outrageous race discrimination against themselves and Donnelley's other African American employees. Plaintiffs seek all relief available including declaratory, injunctive, equitable and punitive relief.

JURISDICTION

1. This action arises under Title 28 U.S.C. Sections 1331, 1343(3) and (4); the Civil Rights Act of 1871, 42 U.S.C. subsection 1981, as amended by the 1991 Civil Rights Act (Section 1981(b)); and the Thirteenth Amendment of the United States Constitution.

2. Declaratory and Injunctive relief is sought pursuant to 42 U.S.C. subsection 1981 and subsection 1981 (b).

3. Liquidated, compensatory and punitive damages are sought pursuant to 42 U.S.C. subsection 1981 as amended for Plaintiffs emotional distress and to punish the defendant for its outrageous and intentional discrimination of its African American employees.

4. Costs and attorneys fees may be awarded pursuant to Federal Rule of Civil Procedure 54, and pursuant to other appropriate statutes.

VENUE

5. This action properly lies in the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. section 1391

(b), as the discriminatory acts complained of herein occurred in this judicial district.

PARTIES

6. Defendant, RR Donnelley & Sons (" RR Donnelley") is a Delaware corporation with its principal place of business in Chicago, Illinois.

7. Plaintiffs fall into two categories which overlap in some instances. All Plaintiff's are African American and all are either a.) current employees of RR Donnelley or b.) former employees of RR Donnelley (either as temporary or as permanent) in RR Donnelley's Chicago division prior to its closing on December 31, 1994. The two categories of Plaintiff classes include, but are not limited to, those from the Chicago division who were terminated prior to the announcement of the shutdown of the Chicago division and those who were terminated as a result of the shutdown the Chicago Division.

8. Defendant RR Donnelley is a "person" within the meaning of Section 1981.

9. Defendant RR Donnelley employs more than five hundred (500) employees and is an employer within the meaning of Section 1981 and is an enterprise engaged in commerce within the meaning of Section 3 ® and 3 (s) of the FLSA.

FACTS

10. In 1981 RR Donnelley initiated a "permanent workforce reduction policy" for its Chicago division. Since commencing that policy in 1981 the workforce of Donnelley nationally has more than doubled.

11. Plaintiffs, who are all African American, were or are employed in various positions with RR Donnelley and include former employees from the Chicago Division which closed on December 31, 1994.

12. That RR Donnelley maintained two workforces at its Chicago Division. One workforce was called its "permanent" workforce. The other division was called its "temporary" workforce. The temporary workforce comprised of approximately 30% of the total workforce in the Chicago division in January, 1993.

13. The word "temporary" takes on new meaning when used to describe the "temporary" employees of RR Donnelley. Many of the employees who were categorized as "temporary" worked for RR Donnelley for 5, 10, 15 and 20 years or more. The "temporary" employees were not given the same benefits as "permanent" employees. The temporary employees did, however, share something in common and that was their race. Ninety-four point three percent (94.3%) of the "temporary" employees at the Chicago division were African American in January, 1993.

14. That Donnelley classified those African American employees as "temporary" in a deliberate and discriminatory fashion to deprive that workforce, which was 94.3% African

American, of the same benefits of the permanent workforce, despite the fact that these employees were not really temporary and in fact had in many cases worked for Donnelley longer than white employees which Donnelley classified as "permanent".

15. That Donnelley also maintained a workforce of "permanent" employees. Approximately 59% of the permanent workforce was white.

16. During the course of their employment, Plaintiffs (both "permanent" and "temporary") performed their job duties in an exemplary manner which met the reasonable expectations of the Defendant.

17. Starting in approximately February, 1993 Donnelley commenced a course of action to close its Chicago division. The closedown of that facility was completed on December 31, 1994.

18. Donnelley fired all of its "temporary" workers, of which 94.3% were African American, in February, 1993 as a result of its decision to close the Chicago division.

19. That the decision to fire its "temporary" workforce was part of a pattern and practice of RR Donnelley to discriminate against its African American employees at the Chicago division and elsewhere.

20. That RR Donnelley also selected certain permanent employees for termination.

21. That RR Donnelley used race (and other discriminatory criteria) as a criteria for deciding which permanent employees would be transferred to other locations and which would be terminated. In using race RR Donnelley decided that it would not transfer, to its other locations, its African American employees. In fact, of the employees who were transferred by RR Donnelley to other locations, only 1.2% were African American.

22. That this decision to not transfer its "permanent" African American workforce was part of a pattern and practice of RR Donnelley to discriminate against its African American employees at the Chicago division and elsewhere which continued through the final closure of that facility on December 31,1994 and continues to this day.

23. That out of RR Donnelley's workforce of approximately 1,000 employees in the Chicago division in January, 1993, approximately 400 were white. Thirty one percent (31%) of those white employees were secretly transferred to other locations.

24. That out of RR Donnelley's total workforce of approximately 1,000 employees in its Chicago division in January, 1993, 575 of those employees were African American. Only seven (7) of Donnelley's 575 African American employees (or 1.2%) were transferred to other locations. The difference between this number and the 31% of white employees that were transferred to other locations is highly statistically significant. The statistical likelihood of this phenomena occurring by chance is substantially less than .0000000000000000000000000000000000000175 (substantially less than 1 in one trillion but there is no word

in mathematics to describe this number). This difference is the equivalent of approximately 14.3 standard deviations. In fact the statistical likelihood of this event occurring by chance is less than the likelihood of being the sole winner of a world lottery on four(4) consecutive Saturdays in which every man, woman and child on earth today buys a ticket. In fact, mathematicians do not have a word for the number in this case other than to call it 10^{-38} and to describe it as dramatically smaller than a fraction of an atom. In other words, the likelihood that Donnelley's actions, in terminating all but seven of its black employees and transferring 31% of its young white employees, is anything other than intentional race discrimination is smaller than a fraction of an atom.

25. At the time of the announcement that RR Donnelley would be closing its Chicago division, RR Donnelley changed its existing long-standing policy which had allowed for bumping on the basis of seniority. Employees were told there would be no opportunity for bumping. This change in policy allowed Donnelley to pick and choose employees it would transfer based on discriminatory criteria. RR Donnelley took full advantage of its discriminatory opportunity and intentionally and systematically excluded African Americans when it hand picked the employees it transferred to its other locations.

26. At the same time RR Donnelley was firing 98.2% of its African American workforce in the Chicago division because of the closure of that facility, RR Donnelley's total workforce was, and continues, to increase dramatically with non African American employees.

27. At the same time RR Donnelley was firing 98.8% of its African American workforce in the Chicago division because of the closure of that facility RR Donnelley was increasing the workforce in its other divisions near and around the Chicago area and the nation with non-African American employees.

28. That the actions of RR. Donnelley in closing the Chicago division and in only transferring its young white employees followed a pattern and practice of race (and other) discriminatory policies by RR Donnelley and was an intentional and deliberate action to rid RR Donnelley of its large workforce of African American employees, both "temporary" and "permanent".

29. That management at RR Donnelley consistently referred to the high number of African Americans at the Chicago division as the "black problem" and management employees were rewarded monetarily and otherwise for "containing" the "black problem" at the Chicago division at various times prior to the closure of that division.

30. Among the African American employees that RR Donnelley selected for termination were excellent and outstanding employees with many years of successful service to RR Donnelley, and many of them had longer tenure and were better performers than the white employees who were secretly transferred by RR Donnelley to other locations.

31. That RR Donnelley engaged in the foregoing pattern and practice of discrimination on the grounds of race, willfully, intentionally and with reckless disregard for the

rights of its employees to be free from discrimination on the grounds of race.

32. This case is properly maintainable as a class action or under Fed. R. Civ. P. 23(a), for the following reasons:

The class for whose benefit the action is brought is so numerous that joinder is impracticable.

There are questions of law or fact common to the class involving defendant's acts and omissions.

Plaintiffs' claims are typical of the claims of class members.

d. Plaintiffs will fairly and adequately protect the interests of the class and has retained counsel competent and experienced in employment discrimination.

33. The class should be certified under Fed. R. Civ. P. 23(b)(2) because defendants have acted or refused to act on appropriate injunctive relief or corresponding declaratory relief with respect to the class as a whole.

34. The class alternatively should be certified under Fed. R. Civ. P. 23(b)(3) because common questions predominate over any questions affecting only individual class members. Further, a class action in this instance is superior to other available methods for the fair, economic and effective adjudication of this controversy.

RACE DISCRIMINATION
SECTION 1981

35. Plaintiffs reallege paragraphs 1-32 as paragraphs 1-32 of this Count.

36. Through RR Donnelley's actions and those of its employees and agents, in refusing to transfer and in terminating all but an infinitesimal number of its African American employees at the Chicago division, RR Donnelley has exhibited discriminatory treatment in the terms and conditions of the Plaintiffs employment based solely on the race of the Plaintiff's which is African American.

37. Through its actions in imploring a classification system of "temporary" employees comprised predominantly (94.3%) of African Americans, who were subject to lesser pay and benefits than "permanent" employees, RR Donnelley, through its agents and employees, has exhibited discriminatory treatment against those temporary employees in the terms and conditions of their employment based solely on the race of the Plaintiffs which is African-American.

38. Through its actions, including but not limited to those described herein, RR Donnelley treated all of the Plaintiffs in a discriminatory manner by condoning and fostering an atmosphere of racial intolerance against the Plaintiffs because of their race and in subjecting the plaintiffs to less favorable treatment than its white employees.

39. Through its actions, RR Donnelley and its agents and employees, intentionally discriminated against Plaintiffs on account of their race and color by denying to each of them

equal terms and conditions of employment because of their race.

40. Through its actions, RR Donnelley and its agents and employees, have deprived Plaintiffs of their right to employment and to their right to equal employment with RR Donnelley because of their race and color.

41. Through its actions, RR Donnelley and its agents and employees have deprived the Plaintiffs of their dignity, humanity and sense of justice and fairness, because of their race and color.

42. RR Donnelley's actions, as described herein with respect to the Plaintiffs constituted a malicious or reckless indifference to the Plaintiffs federally protected rights and RR Donnelley was intentionally discriminatory in violation of the federal anti-discrimination laws.

43. As a proximate result of the practices alleged herein, the Plaintiffs have and will continue to suffer, a substantial loss of wages, fringe benefits and other monetary benefits, and extreme mental pain, suffering and humiliation.

WHEREFORE, Plaintiffs respectfully request the Court grant Plaintiffs the following relief:

a. Trial by Jury on the charges raised in this complaint;

b. That a declaratory judgment be issued that Plaintiffs rights have been violated as alleged above and that the practices complained of herein are unlawful and violative of the Acts cited.

c. Permanently enjoin RR Donnelley, its agents, successors, officers, employees and attorneys and those acting in concert with it or them from engaging in each of the unlawful practices, policies, customs, and usage's set forth herein, and from continuing any and all other practices shown to be in violation of applicable law.

d. That Plaintiffs have and recover from RR Donnelley any and all benefits, wages, backpay, transfer and reinstatement, front pay, with pre- and post-judgment interest, actual, compensatory, consequential and punitive damages and any other damages to which Plaintiffs might be entitled; liquidated damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish and other non-pecuniary losses in an amount not less than FIVE HUNDRED MILLION DOLLARS ($500,000,000).

e. Award Plaintiffs the costs and disbursements of this action, including reasonable attorneys' fees under any and all applicable fee shifting statutes.

f. For such other and further relief as this Court deems just and proper.

JURY DEMAND

PLAINTIFF DEMANDS A TRIAL BY JURY ON ALL COUNTS.

RESPECTFULLY SUBMITTED,

_____

One of the
ATTORNEYS FOR PLAINTIFFS

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Case No. 98 C 4025, Case No. 96 C 7717

[Filed June 8, 2001]

JONATHAN ADAMS, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY & SONS, a Delaware Corporation,
Defendants.

EDITH JONES, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY & SONS,
Defendant.

JUDGES:
MATTHEW F. KENNELLY, United States District Judge.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

In these consolidated suits, the plaintiffs, current and former African-American employees of R.R. Donnelley &

Sons, a printer and provider of information services and logistics, allege employment discrimination in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (a) & 3(a). The Court recently certified three classes of plaintiffs: the first consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division"; the second consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1992 to the present as non-regular employees (including temporary, casual, contract, contingent, task force, etc.)"; and the third consists of "All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Chicago Financial Division; or (c) the Chicago Manufacturing Division from November 1992 to the present and were subject to racial harassment so pervasive as to create a hostile working environment." *See Adams v. R.R. Donnelley*, 2001 U.S. Dist. LEXIS 4247, *69, Nos. 98 C 4025, 96 C 7717, *2001 WL 336830,* at *20 (N.D. Ill. Apr. 6, 2001).

The parties have urged the Court to consider and resolve a single issue--the appropriate statute of limitations to be applied to plaintiffs' claims--arguing that resolution of this issue will in turn govern how the parties proceed on summary judgment and ultimately at trial. As framed by the parties, the question presented is whether the appropriate statute of limitations is the four-year period contained in 28 U.S.C. § 1658 (what has been referred to as the federal "catch-all"

statute of limitations) or the two-year statute of limitations that governs personal injury actions in Illinois.

FACTUAL BACKGROUND

This is not the first time the statute of limitations issue has been raised in this case. Before the cases were consolidated, Donnelley moved for partial summary judgment in the *Jones* case on the ground that the claims relating to its Chicago Manufacturing Division and the claims of many of the named plaintiffs were time-barred, filed after the expiration of what Donnelley argued was the applicable statute of limitations: Illinois' two-year personal injury statute of limitations. The plaintiffs opposed the motion, arguing (among other things) that the applicable statute of limitations was the four-year catch-all period contained in § 1658. Magistrate Judge Ian Levin concluded that § 1658, by its plain language, applied only to Acts of Congress *enacted* after December 1990, not Acts *amended* after December 1990, *Jones v. R.R. Donnelley*, 1999 U.S. Dist. LEXIS 1592, No. 96 C 7717, 1999 WL 33257839, at *9 (N.D. Ill. Feb. 11, 1999); because "the addition of Section 1981(b) was merely an amendment to Section 1981, which occurred after the enactment of Section 1658," Judge Levin reasoned, § 1658 did not apply to the plaintiffs' claims. *Id.* Judge Levin therefore recommended that Judge Williams grant Donnelley's motion for partial summary judgment with respect to all claims relating to the operation and shutdown of the CMD and all the named plaintiffs identified and designated by the defendant in its motion. *Id.* at *12.

The plaintiffs objected to the magistrate's report and recommendation, Donnelley responded, and ultimately Judge Williams denied the summary judgment motion, though she did so on non-statute-of-limitations grounds and indeed stated that the Court "expressed no opinion on the correctness of Judge Levin's analysis of . . . the applicability of 28 U.S.C. § 1658's four-year statute of limitations to actions brought under 42 U.S.C. § 1981 (b)." *Jones v. R.R. Donnelley, 1999 U.S. Dist. LEXIS 1592,* No. 96 C 7717, *1999 WL 639180,* at *2 (N.D. Ill. Aug. 17, 1999). In short, we are essentially writing on a clean slate on the statute of limitations issue, though, as discussed below, we are hardly the first court to consider the question.

DISCUSSION

Before 1991, § 1981 read as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The statute, as then written, protected just two rights: the right to make contracts, which "extended only to the formation of a contract, but not to problems that may arise

later from the conditions of continuing employment," and the right to enforce contracts, which "embraced protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989). The Civil Rights Act of 1991, which became law (i.e., was enacted) on November 21, 1991, revised § 1981, making the above-quoted language subsection (a) and adding two more subsections: subsection (b), which defined "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"; and subsection (c), which made the section applicable to private entities. In other words, the version of § 1981 in the 1991 Act created new causes of action that were not cognizable under the pre-1991 version of the statute.

Because § 1981 does not contain a statute of limitations, courts considering claims under § 1981 for civil rights violations historically have applied the state personal injury statute of limitations, *see Goodman v. Lukens Steel Co.*, 482 U.S. 656, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987); *Reed v. United Transp. Union*, 488 U.S. 319, 323-24, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989), which in Illinois is two years, 735 ILCS 5/13-202. The question for the Court is whether this well-settled proposition was altered by Congress' enactment on December 1, 1990 of 28 U.S.C. § 1658, the federal "catch-all" statute of limitations. Section 1658 provides that "except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the

date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

Looking at the plain language of § 1658, this seems to this Court to be an easy question to answer, though judging by the panoply of ways in which the question has been framed and answered this is apparently a minority view. The Seventh Circuit has yet to address the question of whether § 1658 governs claims brought under the 1991 Act; in fact only one circuit court, the Third, has actually considered, analyzed and answered the question. In *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3rd Cir. 2000), the court held that § 1658 applies "only when Congress establishes a new cause of action without reference to preexisting law. . . ." Thus, because Congress "chose to build upon a statutory text that has existed since 1870," the court held, "Zubi's civil action arises under an Act of Congress enacted before December 1, 1990, and is governed by New Jersey's two-year statute of limitations." *Id.* at 226. The Court cannot imagine how this is possible; in *Patterson*, the United States Supreme Court clearly held that claims such as those asserted by Zubi (discriminatory firing) *did not* arise under the pre-1991 version of § 1981. *See Patterson*, 491 U.S. at 177 ("the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established . . . ."). Rather, such claims can be made only by virtue of Congress' 1991 enactment of § 1981(b).

The Sixth Circuit has acknowledged that this issue exists, though it has not yet decided whether § 1658 actually applies to § 1981 claims. In one case, the district court applied Kentucky's personal injury statute of limitations to the

plaintiff's § 1981 claims without considering § 1658, and the Sixth Circuit remanded with instructions to do so. *Young v. Sabbatine*, 1998 U.S. App. LEXIS 5774, No. 97-5169, 1998 WL 136559, at *3 (6th Cir. March 19, 1998). On remand, the district court found that § 1658 governed the claims, and although the parties tried to argue the issue on appeal, the Sixth Circuit concluded that it lacked jurisdiction to consider the question because the party with standing to do so failed to file a notice of cross-appeal. *Young v. Sabbatine*, 2000 U.S. App. LEXIS 33891, *6, No. 99-6336, 2000 WL 1888672, at *2 n.2 (6th Cir. Dec. 19, 2000).

The Tenth Circuit, interestingly, has applied the state's personal injury statute of limitations to § 1981 claims without so much as discussing the possibility that § 1658 might come into play, *see Reynolds v. School District No. 1, Denver, Colorado*, 69 F.3d 1523 (10th Cir. 1995); *Roberts v. Roadway Express, Inc.*, 149 F.3d 1098 (10th Cir. 1998), which seems odd given that a number of district courts in that circuit *have* considered and resolved the issue--to conflicting ends. *Compare Alexander v. Precision Machining, Inc.*, 990 F. Supp. 1304 (D. Kan. 1997) (holding that § 1658 applies to claims arising out of the 1991 Act), *with Mason v. Anadarko Petroleum Corp.*, 1998 U.S. Dist. LEXIS 4745, No. 97-1051, 1998 WL 166562 (D. Kan. 1998); *Lasley v. Hershey Foods Corp.*, 35 F. Supp. 2d 1319 (D. Kan. 1999); and *Hall v. Flightsafety International, Inc.*, 106 F. Supp. 2d 1171 (D. Kan. 2000) (all holding that § 1658 does not apply to § 1981 claims, even those arising under the 1991 Act). The Tenth Circuit *has* considered § 1658's impact in the context of a § 1983 claim, however, and concluded that the statute would not apply because the 1996 amendment to §

1983--which merely added a right to seek injunctive relief--did not create a cause of action. *See Laurino v. Tate*, 220 F.3d 1213, 1217-18 (10th Cir. 2000). Applying this reasoning to § 1981, one would think the Tenth Circuit would conclude that § 1658 would apply to claims arising under § 1981(b), a post-§ 1658 enactment that *does* create a cause of action--though this is by no means a foregone conclusion.

In addition to these circuit court cases, there are about twenty-five district court decisions on the issue. A catalogue of these decisions is recounted and summarized in many of the decisions, and we will not reiterate it here. Suffice it to say, the courts have split on the issue: some (the majority) have held that § 1658 does not apply to any § 1981 claim, whether arising under the Civil Rights Act of 1991 or under the pre-1991 version of the statute, *see, e.g., Coleman v. Shoney's, Inc.*, 145 F. Supp. 2d 934, 2001 WL 526673 (W.D. Tenn. 2001); *Lane v. Ogden Entertainment, Inc.*, 13 F. Supp. 2d 1261, 1269 (M.D. Ala. 1998); *Hall*, 106 F. Supp. 2d 1171; *Hardin v. CNA Insurance Companies*, 103 F. Supp. 2d 1091 (S.D. Ind. 1999); some have held that § 1658 applies to all § 1981 claims, whether arising under the Civil Rights Act of 1991 or under the pre-1991 version of the statute, *see Rodgers v. Apple South, Inc.*, 35 F. Supp. 2d 974 (W.D. Ky. 1999); *Miller v. Federal Express Corp.*, 56 F. Supp. 2d 955 (W.D. Tenn. 1999); and some have concluded that § 1981 claims may be governed by both § 1658 and the applicable state personal injury statute of limitations, depending on whether the particular claim arises under the 1991 Act or a pre-1991 version of the Act, *see Alexander*, 990 F. Supp. 1304; *see also MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 1998 U.S. Dist. LEXIS 4458,

No. 97 C 2225, 1998 WL 156674 (N.D. Ill. March 31, 1998) (same result as applied to the Telecommunications Act of 1996). We think the last holding is the only one true to the language of the statute.

Judicial inquiry into the applicability of [§ 1658] begins and ends with what [§ 1658] does say and with what [§ 1658] does not." *Connecticut National Bank v. Germain*, 503 U.S. 249, 254, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992). Section 1658 applies to any "civil action arising under an Act of Congress enacted" after December 1, 1990. We see nothing ambiguous in this language, at least as it relates to the claims at issue in this lawsuit. First, although some courts have found otherwise, *see, e.g., Coleman*, 145 F. Supp. 2d 934, 2001 WL 526673, at *4; *Lane*, 13 F. Supp. 2d at 1270; *Davis v. State of California Department of Corrections*, 1996 U.S. Dist. LEXIS 21305, *57, No. S-93-1307DFL GGH, 1996 WL 271001, at *18-*19 (E.D. Cal. 1996), we do not think the statute's reference to "an Act of Congress enacted" is susceptible to more than one reasonable interpretation. "Enact" means "to make into law by authoritative act," Black's Law Dictionary 546 (7th ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted." *See also Rodgers*, 35 F. Supp. 2d at 976 ("All legislative actions of Congress, regardless of form, become law through an enactment by Congress and approval by the President."). To the extent there could ever be any doubt about whether the Civil Rights Act of 1991 was "an Act of Congress" or whether it was "enacted," the language of the law itself should set the record straight. Congress specifically used both words in the law's preamble:

An *Act* to amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

Be it *enacted* by the Senate and House of Representatives of the United States of America in Congress assembled, . . . Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (emphasis added).

Second, there is no question that "civil action" as used in § 1658 means "claim" or "cause of action." *See* David D. Siegal, *The Statute of Limitations in Federal Practice, Including the New 'General' One in Federal Question Cases*, 134 F.R.D. 481, 487 (1991). Finally, there is no question that "arising under" means "stemming from" or "originating in". *See Black's Law Dictionary* 102 (7th ed. 1999).

In short, the meaning of § 1658 is quite simple: whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action. As applied to § 1981, claims that under *Patterson* could be brought under the pre-1991 version of § 1981 clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date, and the catch-all statute does not apply to such claims. Claims that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658. Section 1658 applies to those claims. Having concluded that the language

of the statute is unambiguous, we need not consider the statute's legislative history. *See Germain*, 503 U.S. at 253-54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

The only other district judge in this Circuit who has addressed this issue concluded that § 1658 does not apply to any claims under § 1981, including claims given life by § 1981(b); it relied in part on legislative history that it read as indicating that Congress did not view the Civil Rights Act of 1991 as creating any new causes of action, but rather as "restoring" § 1981 to its proper scope following the Supreme Court's decision in *Patterson*. *Hardin*, 103 F. Supp. 2d at 1095. This Court does not agree. First, as indicated above, resort to legislative history is inappropriate where, as here, the language of the statute is unambiguous. But more importantly, whatever label Congress chose to give to its enactment, it was not "restoring" § 1981, it was changing it. "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803), and in *Patterson* the Supreme Court determined not that § 1981 should be narrowed despite its original intent, but rather that the statute, as enacted in 1866, was never meant to reach certain forms of conduct. *Patterson*, 491 U.S. at 176-77. When Congress enacted § 1981(b), it thus undeniably created new causes of action, whether or not that is how it chose to label what it had done.

A number of courts have noted that our interpretation would result in courts applying two different statutes of limitations for every federal statute enacted prior to December 1, 1990 and amended thereafter to create new types of claims. *See, e.g., Coleman*, 145 F. Supp. 2d 934, 2001 WL 526673, at *5; *Davis*, 1996 U.S. Dist. LEXIS 21305, 1996 WL 271001, at *19. The answer to that is three-fold. First, the Court has not been asked to decide whether § 1658 governs every post-1990 legislative amendment; the Court must decide only whether the statute governs the claims raised by these plaintiffs in this lawsuit. Second, courts routinely apply different statutes of limitations to different claims, including different claims made within a single lawsuit. And third, even if applying multiple statutes of limitations is inconvenient, that is what Congress has required, and the courts are not at liberty to second guess an unambiguous statute.

To summarize, the Court finds that 28 U.S.C. § 1658 is unambiguous and, by its terms, applies to all claims arising out of the Civil Rights Act of 1991, which was enacted after December 1, 1990, the date on which § 1658 was enacted. Section 1658, by its terms, does not apply to claims arising under the pre-1991 version of § 1981; these claims continue to be governed by the most analogous state law statute of limitations, here, Illinois' two-year personal injury statute of limitations.

So what does this mean for the parties in this case? It is clear that claims asserted by Class 1 (the wrongful termination/failure to transfer claims) and Class 3 (the hostile work environment claims) arise under the 1991 Act, *see Patterson*, 491 U.S. at 176-77, and are therefore governed by

§ 1658's four-year statute of limitations. The claims asserted by Class 2, however, are not as easily drawn, and the parties are directed to sort out this question amongst themselves in light of the Court's ruling.

CONCLUSION

For the reasons explained above, the Court finds that the four-year statute of limitations in § 1658 governs those claims created by the Civil Rights Act of 1991; the state personal injury statute of limitations, which in Illinois is two years, governs those claims created by the pre-1991 version of § 1981. The Court will discuss with the parties at the upcoming status hearing how this determination may affect the various issues pending before the Court, including the scope of the respective classes and Donnelley's pending summary judgment motion.

Dated: June 8, 2001

MATTHEW F. KENNELLY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 96 C 7717

[Filed June 27, 2001]

EDITH JONES, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
R.R. DONNELLEY & SONS, a Delaware corporation,	)
	)
Defendant.	)
	)

Judge Matthew F. Kennelly

MOTION TO CERTIFY ISSUE FOR APPEAL

Now comes Defendant R.R. Donnelley & Sons Company ("Donnelley"), and pursuant to 28 U.S.C. § 1292(b), respectfully requests the Court to certify for appeal the issue of whether the four-year statute of limitations contained in 28 U.S.C. § 1658 applies to claims asserted under the Civil Rights Act of 1991. In support of his motion, Donnelley shows the Court as follows:

1. 28 U.S.C. § 1292(b) provides in pertinent part as follows:

> (b) When a district judge in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

2. The issue which Donnelley seeks to have certified here is a textbook example for 28 U.S.C. § 1292(b) application. First, it clearly involves "a controlling question of law" which will have to be resolved on appeal at one stage or another of this litigation. Second, there clearly "is substantial ground for difference of opinion." As recognized by this Court in its Memorandum Opinion and Order, this Court has adopted a minority position contrary to the only appellate decision directly on point, *Zubi v. AT&T Corp.*, 219 F.3d 220 (3rd Cir. 2000), contrary to the majority of district court decisions arising in other circuits (see Memo. Op. At 6-7), and contrary to the only other district court decision in this Circuit, *Hardin v. CNA Insurance Companies,* 103 F. Supp. 2nd 1091 (S.D. Ind. 1999). Third, there can be little question that a prompt appellate resolution may materially advance the ultimate disposition of this litigation. In particular, Donnelley asserts that should the Seventh Circuit rule that § 1658 is inapplicable to the Class 1 claims, those claims should be dismissed as untimely without the necessity of trial.[1] Final

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[1] Contemporaneously, Donnelley has withdrawn its pending motion for partial summary judgment except with respect

resolution of the limitations period at this stage would therefore serve the dual purposes of judicial economy and timely disposition of the central aspect of this litigation.

3. Final resolution of the applicable statute of limitations in this case will also immediately impact every other aspect of this litigation, including class notice, the scope of discovery, dispositive motions and trial. Indeed, not only does this Court's decision leave open issues of timeliness with respect to the claims asserted by Class 2 (see Memo. Op. at 10)[2], but, under the June 8 Order, the Court further would be required to perform an individual analysis with respect to the applicable limitations period for each claim asserted by each individual Plaintiff, a daunting task at best and one that should not be undertaken unless and until absolutely necessary.

4. Donnelley believes that there is no question that it is in the interests of proper utilization of judicial resources for the Court to certify this issue for prompt appellate review rather than run the risk of having needlessly undertaken the painstaking task of sorting out the viability of

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to Class 2 claims, but will renew it if the Seventh Circuit rules against application of 28 U.S.C. § 1658.

[2] In its June 8, 2001 Memorandum Opinion and Order, the Court held that § 1658 does not apply to claims arising under "the pre-1991 version of § 1981" and that such claims continue to be governed by Illinois' two-year personal injury statute of limitations. Donnelley does not seek certification of this portion of the Court's ruling because it demonstrates in a separate memorandum that the two-year limitations period applies to the claims asserted by Class 2 herein under this Court's own rationale.

each and every individual claim for discovery, motion practice and maybe even trial, especially since the issue is certain to be appealed I unless otherwise resolved by the Seventh Circuit prior to final disposition of this case.

5. Finally, the issue which Donnelley seeks to have certified is one of general importance which will have to be resolved by the Court of Appeals at some point. As stated above, this Court's decision creates a split within this circuit, and it would be a further waste of scarce judicial resources for every district judge to decide the issue independently and (given the obvious differences of opinion so far) for at least some cases to require remand and retrial after the Seventh Circuit has spoken.

6. There are no substantial arguments against the certification requested by Donnelley here because interlocutory appeal will advance rather than delay ultimate disposition of this litigation.

WHEREFORE, Donnelley, respectfully requests the Court to certify for appeal the issue of whether the four-year statute of limitations contained in 28 U.S.C. § 1658 applies to claims asserted under the Civil Rights Act of 1991.

Respectfully submitted,

R.R. DONNELLEY & SONS COMPANY

By: /s/ _____
One of its Attorneys

IN THE NORTHERN DISTRICT OF ILLINOIS
UNITED STATES DISTRICT COURT
EASTERN DIVISION

Case No. 96 -C-7717

[Filed July 12, 2001]

EDITH JONES, et al.,

Plaintiffs,

v.

R.R. DONNELLEY & SONS

Defendant.

Judge Matthew F. Kennelly

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO CERTIFY ISSUE FOR APPEAL

Now come the Plaintiffs, by and through their counsel, and respond to defendant's Motion to Certify issue for appeal as follows:

Defendant in its Motion seeks to certify the issue of whether the four-year statute of limitations contained in 28 U.S. § 1658 applies to Plaintiffs 1981 (b) action. In its Motion, however, Donnelley states that it did not wish to certify the question as to whether Class 2 Plaintiffs fall under the post 1991 act or the pre 1991 act. Class 2 plaintiffs are the temporary employees whom Plaintiffs contend were

discriminated against on the basis of their status and classification as temporary employees. Defendant contends that the claims of the temporaries could have been maintained under Section 1981 prior to the Civil Rights Act of 1991, and therefore under this Court's ruling could not benefit from the four-year statute of limitations. Plaintiffs believe that the cause of action for the temporaries could not have been maintained prior to the enactment of the 1991 Civil Rights Act. P1aintiffs' counsel has conferred with defense counsel regarding this issue, and defense counsel are now in agreement that both issues should be certified for appeal.

Plaintiffs are in agreement that both issues should be certified for appeal however Plaintiffs disagree with the reasons set out by defendant. Defendant contends that this Court would be required to perform an individual analysis with respect to the applicable limitations period for each claim asserted by each individual plaintiff. This is hogwash. There are eight forms of discrimination asserted by the Plaintiffs, they are: promotion, demotion, harassment, discharge (which includes RIF's), discipline, pay, training, retaliation, and status. Under this Court's ruling the Court would be required to decide which, if any, of these forms of discrimination could have been asserted under § 1981 prior to the Civil Rights Act of 1991.[1] For each of those claims, which were not cognizable until the Civil Rights Act of 1991, the statute of limitations would be November 25, 1992. The statute of limitations for

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[1] Plaintiffs contend that none of these forms of discrimination could have been maintained under § 1981 prior to the Civil Rights Act.

any claim that the court finds could have been filed prior to the Civil Rights Act of 1991 would be November 25, 1994.

However, one of the three classes certified by this Court could fall if the four-year statute does not stand. The vast majority of the class members are from the CMD and it is fair to say that much of the discovery will be focused on the practices of that division. Plaintiffs agree with defendant in that the final resolution of this issue has an immediate impact on every aspect of this litigation, including the class notice, the scope of discovery, dispositive motions and trial. It makes sense at this juncture to ask the Seventh Circuit to weigh in on the crucial issue as to the statute of limitations for the classes.

Therefore, for the reasons stated herein Plaintiffs ask this Court to certify for appeal the question as to whether the four-year statute of limitations contained in 28 U.S.C. § 1658 applies to § 1981 (b) of the Civil Rights Act of 1991 and whether the temporary employee's claims of discrimination based on their status and classification are subject to that same four year statute of limitations.

Respectfully Submitted,

/s/ _____
Class Counsel

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IN THE NORTHERN DISTRICT OF ILLINOIS
UNITED STATES DISTRICT COURT
EASTERN DIVISION

Case No. 96 - 7717

Judge Matthew F. Kennelly

EDITH JONES, et al.,

Plaintiffs,

v.

R.R. DONNELLEY & SONS

Defendant.

CERTIFICATE OF SERVICE AND NOTICE OF FILING

TO: Thomas Abram
Richard Schnadig
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Grady B. Murdock
J. Paula Roderick
EARL L. NEAL & ASSOCIATES
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District Court Response to Motion - 7/12/01

I, Catherine Caporusso, certify that I filed with the Court and served a copy of the attached Plaintiffs' Response to Defendants Motion to Certify Appeal, upon the above on this 12th day of July 2001 via FIRST CLASS MAIL.

_____
Attorney for Plaintiffs

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United States District Court,
Northern District of Illinois

Judge Matthew F. Kennelly

No. 96 C 7717

[July 27, 2001]

Jones vs. R.R. Donnelley and Sons

(10) X [Other docket entry] Enter Order. The Court grants defendant's motion to certify (245-1) and certifies for appeal under 28 USC § 1292(b) the order of 6/8/01, and specifically the following question: whether in a 1996 lawsuit brought under 42 USC §1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the"catch-all" four year period enacted by Congress in 1990 and codified at 28 USC § 1658, or the personal injury statute of limitations of the forum state.

(11) X [For further detail see order attached to the original minute order.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 96 C 7717

[July 27, 2001]

EDITH JONES, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY AND SONS,
Defendant.

ORDER

MATTHEW F. KENNELLY, District Judge:

In the Court's Memorandum Opinion and Order of June 8, 2001, the Court ruled that the four-year statute of limitations in 28 U.S.C. §1658 governs the claims under 42 U.S.C. §1981 brought by the Class 1 plaintiffs (wrongful termination/failure to transfer) and the Class 3 plaintiffs (hostile work environment), rather than the two year statute of limitations governing Illinois personal injury claims. Defendant has moved the Court to certify the order for appeal under 28 U.S.C. §1292(b). Plaintiffs agree that the order should be certified for appeal.

The Court finds that the criteria for immediate appeal under § 1292(b) have been met. First, the issue of which

statute of limitations applies to the claims in question is a "controlling question of law" within the meaning of § 1292(b). If a two year statute of limitations applies to the plaintiffs' claims, that may well be dispositive of those claims.[1] Second, the issue is one "as to which there is substantial ground for difference of opinion." As discussed in the Court's Memorandum Opinion and Order, disagreement is rife among the district courts that have considered this issue, and this Court's ruling conflicts with the only Circuit-level decision, *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3d Cir. 2000). Third, an immediate appeal is likely to materially advance the ultimate resolution of this litigation. In addition to the possibility that a ruling that the appropriate statute of limitations is two years may dispose of these plaintiffs' claims, determination of these issues is likely to have an immediate impact on almost every aspect of this case, including the content of class notice *(i.e.,* the class opening date); the scope of discovery (estoppel issues, *see* fn. 1 *supra);* and the scope of the evidence to be heard at trial. Finally, the issues are of general public importance. Because actions under § 1981 are not uncommon, disputes over the appropriate statute of limitations are bound to recur, and it would be beneficial to parties and the district courts to have definitive guidance from the Court of Appeals.

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[1] It should be noted that plaintiff maintain that the Class 1 claims should survive, based on allegations of estoppel, even if a two year statute of limitations applies. If the applicable period is four years, however, the plaintiffs and the Court will be able to forego the burdensome and time-consuming task of examining the estoppel issue, possibly on a plaintiff-by-plaintiff basis.

The Court therefore grants defendant's motion to certify [Item 245-1] and certifies for appeal under 28 U.S.C. §1292(b) the order of June 8, 2001, and specifically the following question: whether in a 1996 lawsuit brought under 42 U.S.C. §1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the "catch-all" four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state.

/s/ _____
MATTHEW F. KENNELLY
United States District Judge

Date: July 27, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
NO. ____

Case No. 96C7717

[Filed August 2, 2001]

EDITH JONES, et al.,	)
Plaintiffs,	)
	)
v.	)
	)
R.R. DONNELLEY AND SONS,	)
a Delaware Corporation,	)
Defendant.	)
	)

Judge Matthew F. Kennelly

DEFENDANT'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FRAP 5

Defendant, R.R. Donnelley & Sons ("Donnelley"), hereby petitions this Court, pursuant to Rule 5 of the Federal Rules of Appellate Procedure, for permission to appeal the question of the appropriate statute of limitations to be applied to this lawsuit brought under 42 U.S.C. § 1981 as certified for immediate appeal by the District Court under 28 U.S.C. § 1292(b) on July 27, 2001.

I. CASE HISTORY AND ISSUE PRESENTED

This action alleging race discrimination in employment under 42 U.S.C. § 1981 was commenced on November 25, 1996.

The vast majority of the Plaintiffs worked at Defendant's Chicago Manufacturing Division ("CMD") and were terminated from their employment on or before July 29, 1994 in connection with the closing of that facility.

By Order dated March 7, 2001, the District Court certified three classes, two of them limited to former CMD employees, under Federal Rule of Civil Procedure 23 as follows:

Class 1: All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division;

Class 2: All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1992 to the present as non-regular employees (including temporary, casual, contract, contingent, task force, etc,);

Class 3: All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Pontiac division; (e) the Chicago Financial Division; or (d) the Chicago Manufacturing Division from November 1992 to the present and were subjected to racial harassment so pervasive as to create a hostile working environment ((a), Ca), (c), and (d) are each separate subclasses).

Donnelley filed a Motion for Summary Judgment seeking dismissal of all claims by former CMD employees (including all Class 1 and 2 claims as well as the harassment claims of former CMD employees in Class 3) on the ground that their November 25, 1996 action is untimely because it was filed beyond the two-year Illinois personal injury statute of limitations previously applied by this Court to Section 1981 claims. *See, e.g. Vakharia v. Swedish Covenant Hospital,* 190 F.3d 799, 807 (7th Cir. 1999), *cert. denied,* 530 U.S. 1204 (2000).

By Memorandum Opinion and Order dated June 8, 2001 attached hereto as Exhibit A, the District Court ruled that the four-year federal "catch all" statute of limitations contained in 28 U.S.C. § 1658 applies to the Class 1 and 3 claims. The District Court reasoned that the termination and harassment claims asserted by these classes were not actionable under Section 1981 after *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989) and before passage of the Civil Rights Act of 1991 and, therefore, constituted a civil

action under an Act of Congress "enacted" after December 1, 1990 to which the Section 1658 limitations period applies. The District Court further ruled, however, that the two-year Illinois personal injury statute of limitations continues to apply to claims which could have been raised under the pre-1991 version of Section 1981, expressed uncertainty as to whether Class 2 claims wore actionable post-*Patterson* and pro-1991 Civil Rights Act, and reserved ruling on which statute of limitations applied to Class 2 claims.

By Order of July 27, 2001 attached hereto as Exhibit B, the District Court certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) its statute of limitations ruling with the following question:

> Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the "catch all" four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state.

The District Court has not certified for appeal the question as to whether, under the analysis articulated in its June 8, 2001 Memorandum Opinion and Order, the two or four-year statute of limitations applies to the Class 2 claims.

II. JURISDICTIONAL BASIS FOR APPELLATE REVIEW

28 U.S.C. § 1292(b) provides as follows:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

III. APPELLATE GUIDANCE WILL MATERIALLY ADVANCE TERMINATION OF THIS CASE

Donnelley believes that the District Court is in error and the two-year Illinois personal injury statute of limitations applies to all claims asserted in this case, including those which could not have been raised under the pre-1991 version

of 42 U.S.C. § 1981, with the result that the vast majority of this case, including entire classes of claims, is barred as untimely.[1]

The issue which the District Court certified here is a textbook example for 28 U.S.C. § 1292(b) appellate review. First, deciding the applicable statute of limitations clearly involves "a controlling question of law" which will have to be resolved on appeal at one stage or mother of this litigation. Second, there clearly "is substantial ground for difference of opinion." The District Court in its Memorandum Opinion and Order adopted a minority position contrary to the only appellate decision directly on point, *Zubi v. AT&T Corp.*, 219 F.3d 220 (3rd Cir. 2000), contrary to the majority of district court decisions arising in other circuits, and contrary to the only other district court decision in this Circuit, *Hardin v. CNA Insurance Companies,* 103 F. Supp. 2d 1091 (S.D. Ind. 1999) (see Exhibit A, pp. 5-7).

Further, there can be little question that a prompt appellate resolution will materially advance the ultimate disposition of this litigation. As stated by the District Court, should the Seventh Circuit rule that Section 1658 is inapplicable (as Donnelley contends), entire classes of claims may be dismissed as untimely without the necessity of trial. Final resolution of the limitations period at this stage would

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[1] A ruling by this Court that the two-year statute of limitations applies to all Section 1981 claims would moot the District Court's need to analyze Class 2 claims for purposes of determining which limitations period to apply.

therefore serve the dual purposes ofjudicial economy and timely disposition of a central aspect of this litigation.

As further stated by the District court, determination of the certified issue also "is likely to have an immediate impact on almost every other aspect of this case, including the content of class notice (i.e., the class opening date); the scope of discovery... and the scope of the evidence to be heard at trial" (Exhibit B, p.2). As noted by the District Court, Plaintiffs agree that this issue has broad significance and should be resolved on interlocutory appeal.

Finally, the issue which Donnelley seeks to appeal is one of general importance which will have to be resolved by the Court of Appeals at some point. As also stated by the District Court, "actions under § 1981 are not uncommon, disputes over the appropriate statute of limitations are bound to recur, and it would be beneficial to parties and the district courts to have definitive guidance from the Court of Appeals" (Exhibit B, p. 2).

In sum, the District Court and all parties seek appellate guidance in furtherance of the orderly and timely disposition of all or a substantial portion of this ease. There are no substantial arguments against the appellate review requested by Donnelley here because interlocutory appeal will advance rather than delay ultimate disposition of this litigation. Finally, a resolution of the statute of limitation issue here will provide procedural guidance in other Section 1981 eases in this Circuit.

WHEREFORE, Donnelley respectfully requests the Court to grant permission for appeal of the statute of limitations issue certified by the District Court.

Respectfully submitted,
R.R. Donnelley & Sons

By: /s/ _____
One of Its Attorneys

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DATED: August 2, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

[June 8, 2001]

Exhibit A

JONATHAN ADAMS, et al., Plaintiffs,	)	
vs.	)	**Case No. 98 C 4025**
R.R. Donnelley & Sons, a Delaware Corporation, Defendants.	)	
**********	)	
EDITH JONES, et al., Plaintiffs,	)	
vs.	)	**Case No. 96 C 7717**
R.R. DONNELLEY AND SONS, Defendant.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

In these consolidated suits, the plaintiffs, current and former African-American employees of R.R. Donnelley & Sons, a printer and provider of information services and logistics, allege employment discrimination in violation of 42 U.S.C. §1981 and Title VII of the Civil Rights Act of 1964,

42 U.S.C. §2000e-2(a) & 3(a). The Court recently certified three classes of plaintiffs: the first consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division"; the second consists of "All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1992 to the present as non-regular employees (including temporary, casual, contract, contingent, task force, etc.)"; and the third consists of "All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Chicago Financial Division; or (c) the Chicago Manufacturing Division from November 1992 to the present and were subject to racial harassment so pervasive as to create a hostile working environment." *See Adams v. R.R. Donnelley,* Nos. 98 C 4025, 96 C 7717, 2001 WL 336830, at *20 (N.D. Ill. Apr. 6, 2001).

The parties have urged the Court to consider and resolve a single issue-the appropriate statute of limitations to be applied to plaintiffs' claims-arguing that resolution of this issue will in turn govern how the parties proceed on summary judgment and ultimately at trial. As framed by the parties, the question presented is whether the appropriate statute of limitations is the four-year period contained in 28 U.S.C. § 1658 (what has been referred to as the federal "catch-all" statute of limitations) or the two-year statute of limitations that governs personal injury actions in Illinois.

FACTUAL BACKGROUND

This is not the first time the statute of limitations issue has been raised in this case. Before the cases were consolidated, Donnelley moved for partial summary judgment in the *Jones* case on the ground that the claims relating to its Chicago Manufacturing Division and the claims of many of the named plaintiffs were time-barred, filed after the expiration of what Donnelley argued was the applicable statute of limitations: Illinois' two-year personal injury statute of limitations. The plaintiffs opposed the motion, arguing (among other things) that the applicable statute of limitations was the four-year catch-all period contained in § 1658. Magistrate Judge Ian Levin concluded that § 1658, by its plain language, applied only to Acts of Congress *enacted* after Deeernber 1990, not Acts *amended* after December 1990, *Jones v. R.R. Donnelley,* No. 96 C 7717, 1999 WL 33257839, at *9 (N.D. Ill. Feb, 11, 1999); because "[t]he addition of Section 1981(b) was merely an amendment to Section 1981, which occurred after the enactment of Section 1658," Judge Levin reasoned, §1658 did not apply to the plaintiffs' claims. *Id.* Judge Levin therefore recommended that' Judge Williams grant Donnelley's motion for partial summary judgment with respect to all claims relating to the operation and shutdown of the CMD and all the named plaintiffs identified and designated by the defendant in its motion, *Id.* at *12.

The plaintiffs objected to the magistrate's report and recommendation, Donnelley responded, and ultimately Judge Williams denied the summary judgment motion, though she did so on non-statute-of-limitations grounds and indeed stated-

that the Court "expresse[d] no opinion on the correctness of Judge Levin's analysis of... the applicability of 28 U.S.C. §1658's four-year statute of limitations to actions brought under 42 U.S.C. §1981(b)." *Jones v. R.R. Donnelley,* No. 96 C 7717, 1999 WL 639180, at *2 (N.D. Ill. Aug. 17, 1999). In short, We are essentially writing on a clean slate on the statute of limitations issue, though, as discussed below, we are hardly the first court to consider the question.

DISCUSSION

Before 1991, §1981 read as follows:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The statute, as then written, protected just two rights: the right to make contracts, which "extend[ed] only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment," and the right to enforce contracts, which "embrace[d] protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Patterson v. McLean Credit Union,* 491 U.S. 164, 176-

77 (1989). The Civil Rights Act of 1991, which became law (i.e., was enacted) on November 21, 1991, revised §1981, making the above-quoted language subsection (a) and adding two more subsections: subsection (b), which defined "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship"; and subsection (c), which made the section applicable to private entities. In other words, the version of §1981 in the 1991 Act created new causes of action that were not cognizable under the pre-1991 version of the statute.

Because §1981 does not contain a statute of limitations, courts considering claims under § 1981 for civil rights violations historically have applied the state personal injury statute of limitations, *see Goodman v. Lukens Steel Co.,* 482 U.S. 656 (1987); *Reed v. United Transp. Union,* 488 U.S. 319, 323-24 (1989), which in Illinois is two years, 735 ILCS 5/13-202. The question for the Court is whether this well-settled proposition was altered by Congress' enactment on December 1, 1990 of 28 U.S.C. §1658, the federal "catch-all" statute of limitations. Section 1658 provides that "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

Looking at the plain language of §1658, this seems to this Court to be an easy question to answer, though judging by the panoply of ways in which the question has been framed and answered this is apparently a minority view. The Seventh

Circuit has yet to address the question of whether § 1658 governs claims brought under the 1991 Act; in fact only one circuit court, the Third, has actually considered, analyzed and answered the question. In *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3rd Cir. 2000), the court held that § 1658 applies "only when Congress establishes a new cause of action without reference to preexisting law ..." Thus, because Congress "chose to build upon a statutory text that has existed since 1870," the court held, "Zubi's civil action arises under an Act of Congress enacted before December 1, 1990, and is governed by New Jersey's two-year statute of limitations." *Id.* at 226. The Court cannot imagine how this is possible; in *Patterson,* the United States Supreme Court clearly held that claims such as those asserted by Zubi (discriminatory firing) *did not* arise under the pre-1991 version of §1981. *See Patterson,* 491 U.S. at 177 ("the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established....). Rather, such claims can be made only by virtue of Congress' 1991 enactment of §1981(b).

The Sixth Circuit has acknowledged that this issue exists, though it has not yet decided whether §1658 actually applies to §1981 claims. In one case, the district court applied Kentucky's personal injury statute of limitations to the plaintiff's § 1981 claims without considering § 1658, and the Sixth Circuit remanded with instructions to do so. *Young v. Sabbatine*, No. 97-5169, 1998 WL 136559, at *3 (6th Cir. March 19, 1998). On remand, the district court found that § 1658 governed the claims, and although the parties tried to argue the issue on appeal, the Sixth Circuit concluded that it lacked jurisdiction to consider the question because the party

with standing to do so failed to file a notice of cross-appeal. *Young v. Sabbatine,* No. 99-6336, 2000 WL 1888672, at *2 n.2 (6th Cir. Dec. 19, 2000).

The Tenth Circuit, interestingly, has applied the state's personal injury statute of limitations to § 1981 claims without so much as discussing the possibility that § 1658 might come into play, *see Reynolds v. School District No. 1, Denver, Colorado,* 69 F.3d 1523 (10th Cir. 1995); *Roberts v. Roadway Express, Inc.,* 149 F.3d 1098 (10th Cir. 1998), which seems odd given that a number of district courts in that circuit have considered and rosolved the issue-to conflicting ends. *Compare Alexander v. Precision Machining, Inc.,* 990 F. Supp. 1304 (D. Kan. 1997) (holding that §1658 applies to claims arising out of the 1991 Act), *with Mason v. Anadarko Petroleum Corp.,* No. 97-1051, 1998 WL 166562 (D. Kan. 1998); *Lasley v. Hershey Foods Corp.,* 35 F. Supp. 2d 1319 (D. Kan. 1999); and *Hall v. Flightsafety International, Inc.,* 106 F. Supp. 2d 1171 (D. Kan. 2000) (all holding that §1658 does not apply to §1981 claims, even those arising under the 1991 Act). The Tenth Circuit *has* considered §1658's impact in the context of a §1983 claim, however, and concluded that the statute would not apply because the 1996 amendment to §1983-which merely added a right to seek injunctive relief--did not create a cause of action. *See Laurino v. Tate,* 220 F.3d 1213, 1217-18 (10th Cir. 2000). Applying this reasoning to §1981, one would think the Tenth Circuit would conclude that § 1658 would apply to claims arising under §1981(b), a post-§ 1658 enactment that *does* create a cause of action-though this is by no means a foregone conclusion.

In addition to those circuit court cases, there are about twenty-five district court decisions on the issue. A catalogue of these decisions is recounted and summarized in many of the decisions, and we will not reiterate it here. Suffice it to say, the courts have split on the issue: some (the majority) have held that §1658 does not apply to any §1981 claim, whether arising under the Civil Rights Act of 1991 or under the pre-1991 version of the statute, see, e.g., *Coleman v. Shoney's, Inc.*, - F. Supp. 2d -, No. 99-3134, 2001 WL 526673 (W.D. Tenn. March 9, 2001); *Lane v. Ogden Entertainment, Inc.*, 13 F. Supp. 2d 1261, 1269 (M.D.Ala. 1998); *Hall,* 106 F. Supp. 2d 1171; *Hardin v. CNA Insurance Companies,* 103 F. Supp. 2d 1091 (S.D. Ind. 1999); some have held that §1658 applies to all §1981 claims, whether arising under the Civil Rights Act of 1991 or under the pre- 1991 version of the statute, *see Rodgers v. Apple South, Inc.*, 35 F. Supp. 2d 974 (W.D. Ky. 1999); *Miller v. Federal Express Corp.*, 56 F. Supp. 2d 955 (W.D. Term. 1999); and some have concluded that §1981 claims may be governed by both § 1658 and the applicable state personal injury statute of limitations, depending on whether the particular claim arises under the 1991 Act or a pre-1991 version of the Act, *see Alexander,* 990 F. Supp. 1304; *see also MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, No. 97 C 2225, 1998 WL 156674 (N.D. Ill. March 31, 1998) (same result as applied to the Telecommunications Act of 1996), We think the last holding is the only one true to the language of the statute.

"[J]udicial inquiry into the applicability of [§1658] begins and ends with what [§ 1658] does say and with what [§1658] does not." *Connecticut National Bank v. Germain,* 503 U.S. 249, 254 (1992). Settler, 1658 applies to any "civil

action arising under an act of Congress enacted" after December 1, 1990. We see nothing ambiguous in this language, at least as it relates to the claims at issue in this lawsuit. First, although some courts have found otherwise, *see, e.g., Coleman,* 2001 WL 526673, at *4; *Lane,* 13 F.Supp. 2d at 1270; *Davis v. State of California Department of Corrections,* No. S-93-1307DFL GGH, 1996 WL 271001, at * 18-* 19 (E.D. Cal. 1996), we do not think the statute's reference to "an Act of Congress enacted" is susceptible to more than one reasonable interpretation. "Enact" means "to make into law by authoritative act," Black's Law Dictionary 546 (7th ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted." *See also Rodgers*, 35 F.Supp. 2d at 976 ("All legislative actions of Congress, regardless of form, become law through an enactment by Congress and approval by the President."). To the extent there could ever be any doubt about whether the Civil Rights Act of 1991 was "an Act of Congress" or whether it was "enacted," the language of the law itself should set the record straight. Congress specifically used both words in the law's preamble:

An Act to amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled,... Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (emphasis added).

Second, there is no question that "civil action" as used in §1658 means "claim" or "cause of action." *See* David D. Siegal, *The Statute of Limitations in Federal Practice, Including the New 'General' One in Federal Question Cases*, 134 F.R.D. 481, 487 (1991). Finally, there is no question that "arising under" means "stemming from" or "originating in". *See* Black's Law Dictionary 102 (7th ed. 1999).

In short, the meaning of §1658 is quite simple: whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action. As applied to §1981, claims that under *Patterson* could be brought under the pro-1991 version of § 1981 clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date, and the catch-all statute does not apply to such claims. Claims that *Patterson* said could not be brought under the pre-1991 version of §1981, but which can be made only by virtue of §1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after §1658. Section 1658 applies to those claims. Having concluded that the language of the statute is unambiguous, we need not consider the statute's legislative history. See *Germain,* 503 U.S. at 253-54 ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

The only other district judge in this Circuit who has addressed this issue concluded that §1658 does not apply to any claims under §1981, including claims given life by §1981(b); it relied in part on legislative history that it read as indicating that Congress did not view the Civil Rights Act of 1991 as creating any new causes of action, but rather as "restoring" §1981 to its proper scope following the Supreme Court's decision in *Patterson*. *Hardin,* 103 F. Supp. 2d at 1095. This Court does not agree. First, as indicated above, resort to legislative history is inappropriate where, as here, the language of the statute is unambiguous. But more importantly, whatever label Congress chose to give to its enactment, it was not "restoring" §1981, it was changing it. "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 177 (1803), and in *Patterson* the Supreme Court determined not that §1981 should be narrowed despite its original intent, but rather that the statute, as enacted in 1866, was never meant to reach certain forms of conduct. *Patterson,* 491 U.S. at 176-77. When Congress enacted §1981(b), it thus undeniably created new causes of action, whether or not that is how it chose to label what it had done.

A number of courts have noted that our interpretation would result in courts applying two different statutes of limitations for every federal statute enacted prior to December 1, 1990 and amended thereafter to create now types of claims. *See, e.g., Coleman,* 2001 WL 526673, at *5; *Davis,* 1996 WL 271001, at *19. The answer to that is three-fold. First, the Court has not been asked to decide whether §1658 governs every post-1990 legislative amendment; the Court must decide

only whether the statute governs the claims raised by these plaintiffs in this lawsuit. Second, courts routinely apply different statutes of limitations to different claims, including different claims made within a single lawsuit. And third, even if applying multiple statutes of limitations is inconvenient, that is what Congress has required, and the courts are not at liberty to second guess an unambiguous statute.

To summarize, the Court finds that 28 U.S.C. §1658 is unambiguous and, by its terms, applies to all claims arising out of the Civil Rights Act of 1991, which was enacted after December 1, 1990, the date on which §1658 was enacted. Section 1658, by its terms, does not apply to claims arising under the pre-1991 version of §1981; these claims continue to be governed by the most analogous state law statute of limitations, here, Illinois' two-year personal injury statute of limitations.

So what does this mean for the parties in this case? It is clear that claims asserted by Class 1 (the wrongful termination/failure to transfer claims) and Class 3 (the hostile work environment claims) arise under the 1991 Act, *see Patterson,* 491 U.S. at 176-77, and are therefore governed by §1658's four-year statute of limitations. The claims asserted by Class 2, however, are not as easily drawn, and the parties are directed to sort out this question amongst themselves in light of the Court's ruling.

CONCLUSION

For the reasons explained above, the Court finds that the four-year statute of limitations in § 1658 governs those

claims created by the Civil Rights Act of 1991; the state personal injury statute of limitations, which in Illinois is two years, governs those claims created by the pre-1991 version of §1981. The Court will discuss with the parties at the upcoming status hearing how this determination may affect the various issues pending before the Court, including the scope of the respective classes and Donnelley's pending summary judgment motion.

Dated: June 8, 2001

/s/ _____
MATTHEW F. KENNELLY
United States District Judge

United States District Court,
Northern District of Illinois

Judge Matthew F. Kennelly

No. 96 C 7717

[July 27, 2001]

Jones vs. R.R. Donnelley and Sons

Exhibit B

(10) X [Other docket entry] Enter Order. The Court grants defendant's motion to certify (245-1) and certifies for appeal under 28 USC § 1292(b) the order of 6/8/01, and specifically the following question: whether in a 1996 lawsuit brought under 42 USC §1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the"catch-all" four year period enacted by Congress in 1990 and codified at 28 USC § 1658, or the personal injury statute of limitations of the forum state.

(11) X [For further detail see order attached to the original minute order.]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 96 C 7717

[July 27, 2001]

EDITH JONES, et al.,
Plaintiffs,

vs.

R.R. DONNELLEY AND SONS,
Defendant.

ORDER

MATTHEW F. KENNELLY, District Judge:

In the Court's Memorandum Opinion and Order of June 8, 2001, the Court ruled that the four-year statute of limitations in 28 U.S.C. §1658 governs the claims under 42 U.S.C. §1981 brought by the Class 1 plaintiffs (wrongful termination/failure to transfer) and the Class 3 plaintiffs (hostile work environment), rather than the two year statute of limitations governing Illinois personal injury claims. Defendant has moved the Court to certify the order for appeal under 28 U.S.C. §1292(b). Plaintiffs agree that the order should be certified for appeal.

The Court finds that the criteria for immediate appeal under § 1292(b) have been met. First, the issue of which statute of limitations applies to the claims in question is a

"controlling question of law" within the meaning of § 1292(b). If a two year statute of limitations applies to the plaintiffs' claims, that may well be dispositive of those claims.[1] Second, the issue is one "as to which there is substantial ground for difference of opinion." As discussed in the Court's Memorandum Opinion and Order, disagreement is rife among the district courts that have considered this issue, and this Court's ruling conflicts with the only Circuit-level decision, *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3d Cir. 2000). Third, an immediate appeal is likely to materially advance the ultimate resolution of this litigation. In addition to the possibility that a ruling that the appropriate statute of limitations is two years may dispose of these plaintiffs' claims, determination of these issues is likely to have an immediate impact on almost every aspect of this case, including the content of class notice *(i.e.,* the class opening date); the scope of discovery (estoppel issues, *see* fn. 1 *supra);* and the scope of the evidence to be heard at trial. Finally, the issues are of general public importance. Because actions under § 1981 are not uncommon, disputes over the appropriate statute of limitations are bound to recur, and it would be beneficial to parties and the district courts to have definitive guidance from the Court of Appeals.

The Court therefore grants defendant's motion to certify [Item 245-1] and certifies for appeal under 28 U.S.C.

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[1] It should be noted that plaintiff maintain that the Class 1 claims should survive, based on allegations of estoppel, even if a two year statute of limitations applies. If the applicable period is four years, however, the plaintiffs and the Court will be able to forego the burdensome and time-consuming task of examining the estoppel issue, possibly on a plaintiff-by-plaintiff basis.

§1292(b) the order of June 8, 2001, and specifically the following question: whether in a 1996 lawsuit brought under 42 U.S.C. §1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the "catch-all" four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state.

/s/ _____
MATTHEW F. KENNELLY
United States District Judge

Date: July 27, 2001

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **DEFENDANT'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FRAP 5** by causing a true and correct copy of the same to be HAND DELIVERED to the following individuals on this 2nd day of August, 2001:

H. Candace Gorman
Catherine Caporusso
LAW OFFICES OF H.
CANDACE GORMAN
542 South Dearborn Street
Suite 1060
Chicago, Illinois 60605

/s/ _____
Lawrence L. Summers

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 21, 2001

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. Diane P. Wood, *Circuit Judge*

R.R. DONNELLEY & SONS COMPANY, a Delaware Corporation,
Petitioner,

No. 01-8026 v.

EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, et al.,
Respondents.

Petition for Permission to Appeal.
Northern District of Illinois, Eastern Division.

Matthew F. Kennelly, Judge.

The following is before the court: DEFENDANT'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FRAP 5, filed on August 2, 2001 by counsel for the petitioner.

IT IS ORDERED that the petition for leave to appeal is GRANTED. Petitioner shall pay the required appellate fees to the clerk of the district court within ten days from the entry of this order pursuant to Fed. R. App. P. 5(d) (1). Once the district court notifies this court that the fees have been paid, the appeal will be entered on this court's general docket.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3271

[Filed September 16, 2002]

EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, et al., Plaintiffs-Appellees,	)
v.	)
R.R. DONNELLEY & SONS COMPANY, a Delaware corporation, Defendant-Appellant.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 7717
Matthew F. Kennelly, Judge

JUDGES:
Before RIPPLE, KANNE and EVANS, Circuit Judges.

OPINION

RIPPLE, *Circuit Judge*. Several classes of plaintiffs brought suit against their former employer, R.R. Donnelley & Sons ("Donnelley"), for race discrimination pursuant to 42 U.S.C. § 1981. Before the court is a single certified question: "Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the

appropriate statute of limitations is the 'catch-all' four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state?" R. 248 at 2. The district court determined that § 1658 provided the applicable statute of limitations for the plaintiffs' claims. Because we find ourselves in respectful disagreement with the district court, we reverse its decision and remand the case for further proceedings consistent with this opinion.

I BACKGROUND

A.

The plaintiffs are members of three classes of African-American former employees of Donnelley's Chicago Manufacturing Division, many of whom were terminated or transferred from their employment on or before July 29, 1994, in connection with the closing of that facility.[1] Their

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[1] The district court certified three classes of employees:

> All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division and who were discharged during the shutdown of that division and were not transferred to another Donnelley division;
>
> All African-American employees of R.R. Donnelley who were employed at the Chicago Manufacturing Division at any time from November 1991 to the present as non-regular employees (including temporary, casual, contract,

claims against Donnelley include discriminatory transfer, discriminatory termination and racially hostile work environment. They filed their initial pleading in this case on November 25, 1996.

In its answer, Donnelley raised the statute of limitations as an affirmative defense; Donnelley claimed that the "alleged 42 U.S.C. § 1981 claims which arose more than two years prior to the filing of the complaint are barred by the applicable statute of limitations." R. 2 at 16. Soon after filing its answer, Donnelley moved for summary judgment on the claims of those plaintiffs whose employment was terminated on or around July 29, 1996.[2] According to Donnelley, this court's decision in *Smith v. City of Chicago Heights*, 951 F.2d 834, 836 n.1 (7th Cir. 1992), established that Illinois' two-year statute of limitations for personal injury claims was the

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> contingent, task force, etc.);
>
> All African-American employees of R.R. Donnelley who worked at (a) the Dwight division; (b) the Pontiac division; (c) the Chicago Financial Division; or (d) the Chicago Manufacturing Division from November 1992 to present and were subjected to racial harassment so pervasive as to create a hostile working environment.

R. 230 at 39. The present issue concerns those individuals belonging to all of the classes whose employment was terminated on or about July 29, 1994.

[2] Donnelley's motion was not confined to the statute of limitations issue, but included other issues that are not before the court on this appeal.

applicable statute of limitations for claims of race discrimination arising in Illinois and brought under 42 U.S.C. § 1981. *See* R. 10 at 2. Because the complaint was not filed until November 1996, more than two years after the plaintiffs' last employment at Donnelley, their claims were time-barred.[3]

In their response, the plaintiffs presented three reasons why their claims should be considered timely. First, the plaintiffs argued that the termination of their employment was part of a larger program of discrimination by Donnelley and that, consequently, "no statute of limitations should be imposed in this case." R.. 102 at 4. In the alternative, the plaintiffs submitted that the appropriate statute of limitations for violations of 42 U.S.C. § 1981 was the four-year statute of limitations provided in 28 U.S.C. § 1658. Specifically, the plaintiffs maintained that their claims arose under amendments to § 1981 enacted through the Civil Rights Act of 1991. Their claims, therefore, arose under the 1991 Civil Rights Act, a law enacted after § 1658, and therefore were subject to § 1658's four-year statute of limitations. Finally, the plaintiffs argued that the doctrines of equitable estoppel and equitable tolling should apply to extend the statute of limitations to allow the plaintiffs to maintain their claims.

B.

The parties eventually narrowed the issue to be resolved by the district court: The appropriate statute of

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[3] Donnelley also represented this issue at least two other times later in the litigation before the district court ruled on the motion.

limitations to apply to the claims of those plaintiffs whose employment was terminated in conjunction with the closing of the Chicago facility. The district court began its analysis by looking at the language of § 1981 prior to the adoption of the 1991 Civil Rights Act:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1990). The court then noted that in *Patterson v. McLean Credit Union*, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989), the Supreme Court had interpreted § 1981 to protect just two rights:

> the right to make contracts, which "extended only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment," and the right to enforce contracts, which "embraced protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race."

R. 244 at 4 (quoting *Patterson*, 491 U.S. at 176-77). Consequently, after *Patterson* was handed down, § 1981 had a very limited scope that did not include claims for discriminatory termination or hostile work environment.

As part of the Civil Rights Act of 1991, the district court noted, Congress amended § 1981 to define "'make and enforce contracts' to include 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Id.* (quoting 42 U.S.C. § 1981(b)). Under this language, aggrieved employees could pursue claims of discrimination based upon events that occurred during the course of their employment.

After reviewing this evolution of § 1981, the district court turned to the question of the appropriate statute of limitations for claims brought under § 1981. The court acknowledged that courts considering claims under § 1981 historically have applied the personal injury statute of limitations of the forum state. *See id.* However, the court believed that "this well-settled proposition was altered by Congress' enactment on December 1, 1990 of 28 U.S.C. § 1658, the federal 'catch-all' statute of limitations." *Id.* Section 1658 provides in relevant part: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a).[4] Noting that § 1658 applies

[4] Until July 30, 2002, § 1658 only consisted of the quoted language. However, on that date, Congress amended § 1658 by designating the quoted language as subsection (a) and adding subsection (b) which provides:

> Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of --
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 § 804(a), 116 Stat. 745, 801 (2002). Nothing in the amendment affects the language of now subsection (a) or the analysis of that subsection contained in this opinion.

to any "civil action arising under an Act of Congress enacted" after December 1, 1990, the district court took the view that "An Act of Congress enacted" was not "susceptible to more than one reasonable interpretation." R. 244 at 8 (internal quotation marks omitted).

"Enact" means "to make into law by authoritative act," Black's Law Dictionary 546 (7th ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is "enacted." To the extent there could ever be any doubt about whether the Civil Rights Act of 1991 was "an Act of Congress" or

whether it was "enacted," the language of the law itself should set the record straight.

Id. (internal citations omitted). The court went on to note that the preamble to the Civil Rights Act of 1991 both defines it as "An *Act* to amend the Civil ,Rights Act of 1964 . . ." and also begins with "Be it *enacted* . . . ." *Id.* (emphasis in original and internal quotation marks omitted). The court also found it unambiguous that "arising under" meant "stemming from" or "originating in." *Id.* (internal quotation marks and citations omitted). The court concluded that the meaning of § 1658 was that "whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action." *Id.*

The court then applied its interpretation of § 1658 to the facts presented. The court stated that § 1981 claims allowed by *Patterson* "clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date, and the catch-all statute does not apply to such claims." *Id.* at 8-9. However, "claims that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658." *Id.* at 9. Therefore, the district court concluded that § 1658 applies to that latter class of claims.

The court acknowledged that its decision was contrary to the only court of appeals decision to address the issue, *see Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3d Cir. 2000), as well as the majority of the district courts. Quoting the Third Circuit, the district court read *Zubi* as based on the rationale

that Congress, in enacting the 1991 legislation, had chosen "to build upon a statutory text that has existed since 1870," and therefore "Zubi's civil action arises under an Act of Congress enacted before December 1, 1990, and is governed by New Jersey's two-year statute of limitations." R. 244 at 5 (quoting *Zubi*, 219 F.3d at 225-26). The district court could not "imagine how this [was] possible," because "in *Patterson*, the United States Supreme Court clearly held that claims such as those asserted by *Zubi* (discriminatory firing) *did not* arise under the pre-1991 version of § 1981." R. 244 at 5. The district court then summarized its holding:

> The Court finds that 28 U.S.C. § 1658 is unambiguous and, by its terms, applies to all claims arising out of the Civil Rights Act of 1991, which was enacted after December 1, 1990, the date on which § 1658 was enacted. Section 1658, by its terms, does not apply to claims arising under the pre-1991 version of § 1981; these claims continue to be governed by the most analogous state law statute of limitations, here, Illinois' two-year personal injury statute of limitations.
>
> So what does this mean for the parties in this case? It is clear that claims asserted by Class 1 (the wrongful termination/failure to transfer claims) and Class 3 (the hostile work environment claims) arise under the 1991 Act, and are therefore governed by § 1658's four-year statute of limitations. . . . *Id.* at 10-11 (internal citations omitted).

C.

After the district court issued its memorandum opinion, Donnelley requested that the court certify the issue of the appropriate statute of limitations for immediate review. Determining that the criteria for an immediate appeal pursuant to 28 U.S.C. § 1292(b) had been met, the district court granted the defendant's motion to certify the following question:

> Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment, and maintenance of a racially hostile work environment, the appropriate statute of limitations is the "catch-all" four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658, or the personal injury statute of limitations of the forum state.

R. 248 at 2. By order of August 21, 2001, this court allowed Donnelley to pursue its appeal.

II DISCUSSION

To determine the appropriate statute of limitations, we must interpret two federal statutes; accordingly, we review the district court's interpretation de novo. *See, e.g., Zambrano v. Reinert*, 291 F.3d 964, 968 (7th Cir. 2002) (reviewing question of statutory and constitutional interpretations de novo); *see also Zubi*, 219 F.3d at 221 (reviewing de novo the question of the appropriate statute of limitations for § 1981 actions after the enactment of § 1658).

Prior to the enactment of § 1658, it was clear that the proper statute of limitations for § 1981 actions was the forum state's statute of limitations for personal injuries. *See Smith v. City of Chicago Heights*, 951 F.2d 834, 837 n. 1 (7th Cir. 1992) (citing *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-64, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987)). The plaintiffs maintain, however, that three intervening judicial and legislative events have occurred that alter the existing rule. First, the Supreme Court held in *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989), that § 1981 only granted two discrete rights: the right to make contracts, which "extends only to the formation of a contract, but not to problems that may arise later from conditions of continuing employment," and the right to enforce contracts, which "embraces protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race." *Id.* at 176-77. Second, in 1990, Congress enacted a uniform catch-all statute of limitations that provided a four-year statute of limitations for "civil actions arising under an Act of Congress" enacted after the effective date and for which a specific statute of limitations was not provided. Third, Congress amended § 1981 by way of the Civil Rights Act of 1991; specifically, it redefined "make and enforce contracts" to include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Because their actions "arise under" the 1991 Civil Rights Act, § 1658 provides the applicable statute of limitations.

In reply, Donnelley submits that Congress intended § 1658 to apply only to wholly new causes of action and not

those built upon existing statutory schemes. According to Donnelley, "neither the statutory language of § 1658 nor this Court's jurisprudence on statutory interpretation sanctions" the plaintiffs' reading of § 1658. Appellant's Br. at 6. We shall consider these arguments below.

As with any statutory interpretation question, determination of the meaning and application of § 1658 to the § 1981 claims at issue must begin with the statutory language of both provisions. *See Masters v. Hesston Corp.*, 291 F.3d 985, 989 (7th Cir. 2002) ("The interpretation of a statute is a question of law, which we review *de novo.*"). Prior to the adoption of the Civil Rights Act of 1991, § 1981 stated:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1990). Until the Supreme Court's decision in *Patterson*, courts generally interpreted § 1981 to encompass causes of action for race discrimination that occurred at any point during the employment relationship. *See, e.g., Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1430 (7th Cir. 1986) (upholding jury verdict of discriminatory treatment and termination under § 1981).

However, the Supreme Court in *Patterson* held that § 1981 should be interpreted more narrowly:

> The conduct which petitioner labels as actionable racial harassment is postformation conduct by the employer relating to the terms and conditions of continuing employment. . .
>
> This type of conduct, reprehensible though it be if true, is not actionable under § 1981, which covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process.

Patterson, 491 U.S. at 179. As part of the Civil Rights Act of 1991, Congress enacted an amendment to § 1981 that "reversed" the *Patterson* decision. Specifically, Congress added a subsection to § 1981 that defined "make and enforce contracts" broadly; the current version of § 1981 states:

> § 1981. Equal rights under the law
>
> (a) Statement of equal rights
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains,

penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (emphasis added). Consequently, under the amended § 1981, an employee may bring a cause of action against his employer for discriminatory conduct that occurs after the employment relationship is formed.

Section 1981 does not contain its own statute of limitations. Consequently, prior to § 1981's amendment in 1991, courts applied the most analogous state statute of limitations to actions brought under that section. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660, 96 L. Ed. 2d 572, 107 S. Ct. 2617 (1987) ("Because § 1981 . . . does not contain a statute of limitations, federal courts should select the most appropriate or analogous state statute of limitations."). For actions brought in Illinois, this court has

determined that Illinois' two-year statute for personal injury claims is most analogous. *See, e.g., Vakharia v. Swedish Covenant Hosp.*, 190 F.3d 799, 807 (7th Cir. 1999), *cert. denied*, 530 U.S. 1204, 147 L. Ed. 2d 233, 120 S. Ct. 2197 (2000) (applying Illinois' two-year statute of limitations for personal injury claims to a cause of action brought pursuant to § 1981).

The plaintiffs maintain that, at least with respect to § 1981 actions that were barred by the *Patterson* decision, 28 U.S.C. § 1658 now provides the applicable statute of limitations. We look therefore to the language of § 1658 to determine if it applies to any claims brought under § 1981. Section 1658 provides in relevant part: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a).

Certainly, the plaintiffs' claims are "civil actions." The central question therefore is whether their claims "arise under an Act of Congress enacted after the date of the enactment of this section." The district court equated "arising under" with "'stemming from' or 'originating in. '"R. 244 at 8 (quoting Black's Law Dictionary 102 (7th ed. 1999)). In the district court's view, claims prohibited by *Patterson*, "but which can be made only by virtue of § 1981(b), . . . clearly arise under the Civil Rights Act of 1991. . . ." *Id.* In essence, the district court believed that the plaintiffs' claims "arise under" the 1991 Civil Rights Act because, by virtue of *Patterson*, those claims could not have been brought prior to the passage of the 1991 Act.

We respectfully disagree, however, that the plain language of § 1658, standing alone, compels the conclusion that § 1658 must apply to every statute subject to any amendatory action by Congress. The language of § 1658 addresses only a "civil action" that "arises under" an act adopted after § 1658's effective date. The language simply does address the eventuality when a cause of action "arises under" two different "Acts," one enacted before and one enacted after the effective date of § 1658. Consequently, we must look not only at the language of § 1658 and § 1981, but also the structure and history of those statutes to determine whether § 1658 provides the applicable statute of limitations for the plaintiffs' claims. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 326-27 (7th Cir. 1995) (stating that a court may look beyond the text of a statute where the language is ambiguous, where a literal interpretation would lead to "absurd results" or where a literal interpretation would "thwart the goals of the statutory scheme").

At the outset of our inquiry, we remain focused on the language and structure of § 1658. By its terms, § 1658 applies to civil actions "arising under an Act of Congress *enacted* after the date of the enactment of this section . . . ." 28 U.S.C. § 1658 (emphasis added). As noted by one of our sister circuits, "the phrase 'an Act of Congress enacted' after 1990 is not equivalent to the phrase 'an Act of Congress enacted or amended' after that year." *Madison v. IBP, Inc.*, 257 F.3d 780, 798 (8th Cir. 2001), *vacated on other grounds*,

122 S. Ct. 2583 (2002).[5] "Amendments vary in their purpose, and the line between an amendment that modifies an existing right and one that creates a new right is often difficult to draw." *Zubi v. AT&T Corp.*, 219 F.3d 220, 224 (3d Cir. 2000). The difficulty in discerning a technical from a substantive amendment, or an amendment that modifies an existing civil action from one that creates a wholly new one,

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[5] In *Madison v. IBP, Inc.*, 257 F.3d 780, 798 (8th Cir. 2001), *vacated on other grounds*, 122 S. Ct. 2583 (2002), the plaintiffs had brought Title VII claims as well as § 1981 claims. With respect to the plaintiffs' Title VII claims, the Eighth Circuit ruled that because Title VII has a 300 day limitations period, the district court should have instructed the jury that Madison could only recover damages under Title VII for illegal acts occurring within the 300 day period prior to the filing of her administrative charge. Since Madison filed her charge on January 13, 1995, she was entitled to recover damages under Title VII only for acts of discrimination or harassment occurring after March 19, 1994. The court therefore erred in instructing the jury that she could recover punitive damages under Title VII for illegal acts occurring after January 13, 1993.

Id. at 797. However, in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2077 (2002), the Supreme Court held that "[a] charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." It was in light of its decision in *Morgan* that the Supreme Court vacated the decision of the Eighth Circuit in *IBP. See Madison v. IBP, Inc.*, 153 L. Ed. 2d 773, 122 S. Ct. 2583 (2002). The Supreme Court did not pass judgment on, or otherwise call into question, the Eighth Circuit's reasoning with respect to the § 1981 claim.

has led two of our sister circuits to reject a reading of § 1658 that would call for such guess work. According to the Eighth Circuit, "when Congress amends a preexisting statute, it does not create a 'new act, 'and claims arising under the statute as amended continue to arise under the preexisting statute. It is, thus, only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Id.* at 225.

The purpose behind § 1658 confirms the significance of the distinction drawn by the Eighth Circuit. In enacting this section, Congress sought to alleviate the uncertainty inherent in the practice of borrowing analogous state statutes of limitations for federal causes of action that do not contain their own limitations periods:

> At present, the federal courts "borrow" the most analogous state or federal law limitations period for federal claims lacking limitations periods. This practice creates a number of practical problems. As pointed out by the Study Committee:
>
> It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitations periods.

H.R. Rep. No. 101-734, at 24. Notably, Congress also was concerned with disrupting litigants' settled expectations

and therefore made § 1658 prospective. This concern is reflected in the House Report as well:

> Section 111 addresses this problem by creating a four-year fallback statute of limitations, applicable to legislation enacted after the effective date of this Act, which creates a cause of action but is silent as to the applicable limitations period.
>
> Witnesses testifying on behalf of the Department of Justice and the Judicial Conference, urged that this section be made retrospective, so as to provide a fallback statute of limitations for previously enacted legislation lacking a limitations period. As witness George Freeman noted at the hearing, however, with respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties. Given that settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to

> apply this section retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs.

Id. We believe that Donnelley's proposed interpretation of § 1658 is most compatible with this interest in certainty and in honoring settled expectations. Under this approach, plaintiffs do not have to guess whether their action arose under the original enactment or its amendment. Section 1658, therefore, applies only when an act of Congress creates a wholly new cause of action, one that does not depend on the continued existence of a statutory cause of action previously enacted and kept in force by the amendment.

The plaintiffs maintain that their proposed interpretation of § 1658 provides certainty and, at the same time, does not disrupt litigants' expectations. According to the plaintiffs, because the type of claims on which they seek relief did not exist post-*Patterson* and pre-§ 1981(b), there are no settled expectations to disrupt with respect to the statute of limitations to apply to such claims. "At first blush," the plaintiffs' interpretation does appear "to promise a fair degree of certainty in application"; if the newly enacted statute created a cause of action that did not exist previously, then § 1658 applies. *Zubi*, 219 F.3d at 224. "But that promise," as the Third Circuit has explained, "upon reflection, seems to us illusory." *Id.*

> First, as we have pointed out, [this] interpretation results in different statutes of limitations being applied to plaintiffs suing under the same statute depending on the particular facts of their claims. Thus, for

> example, plaintiffs who invoke § 1981 because they have been victims of discrimination in hiring will have their claims governed by one statute of limitations, while plaintiffs who invoke the same statute because they are victims of a discriminatory discharge will have their claims governed by another. Adoption of such an interpretation would seem to us to generate exactly the kind of confusion and unfairness that Congress sought to avoid.
>
> Recognition of two classes of plaintiffs under § 1981, when applied in a state with a statute of limitations for § 1981 claims larger than four years, is likely to result in unsuspecting plaintiffs who have relied on established precedent finding themselves barred from relief. Conversely, recognizing two classes, when applied in a state with a statute for § 1981 claims shorter than four years, is likely to result in defendants finding themselves faced with potential liability on claims they believed extinguished.

Id.

We believe that the Third Circuit's interpretation is most consonant with the purpose of § 1658 and the balance struck by Congress between the need for uniformity and the need to preserve settled expectations. Under this formulation,

> when an Act of Congress passed after December 1, 1990, amends a statute existing

> before that date, as opposed to creating a new law without reference to previously existing statutory language, all claims accruing after the passage of the amendment arise under an Act of Congress enacted before December 1, 1990, without regard to whether an identical claim arising earlier could have been successfully pursued under the prior statute.

Zubi, 219 F.3d at 222. Thus, it is "only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Id.* at 225.

We now turn to the language, structure and history of § 1981 to determine whether, given the manifest intent of Congress in enacting § 1658, it is appropriate to apply the applicable state statute of limitations or the federal catch-all provision. We again begin with the language and the structure of the statute. The most salient feature of the revised statute is that § 1981(b) simply cannot stand on its own. An action to recover for discriminatory post-formation treatment simply cannot be based solely on § 1981(b). Indeed, without § 1981(a), § 1981(b) is meaningless. Consequently, although post-formation discriminatory claims depend on the amendatory language of § 1981(b) in the sense that the definitional language of that subsection makes clear that "make and enforce" includes post-formation conduct, the cause of action for post-formation conduct "arises under" § 1981(a); that subsection, not subsection (b), provides the actual right to recovery.

That this structural formation of the revised § 1981 is no accident is clear when we turn to the history of the

amendment. There is no question that reversing the *Patterson* decision was the driving force behind the enactment of § 1981(b). *See* H.R. Rep. No. 102-40 (I), at 88-92 (1991) (explaining the need to overrule *Patterson* and that the act "would overrule *Patterson* by adding at the conclusion of section 1981 a new subsection (b)"). Notably, Congress chose to overrule *Patterson* not by creating an entirely new statutory provision. Indeed, Congress did not alter the original language of § 1981 (now § 1981(a)), which provides the basic right of recovery for an individual whose constitutional rights have been violated; instead, Congress merely supplied a more precise definition to one of the rights already guaranteed by § 1981 -- the right "to make and enforce contracts." Congress could have overruled *Patterson* in a number of ways. Instead of creating a wholly new cause of action, Congress merely defined the term "make and enforce contracts" for the purpose of the old § 1981, now § 1981(a). Congress' action therefore evinces a desire to tie the new cause of action to the existing § 1981.

Moreover, it is highly significant that, when Congress passed the Civil Rights Act of 1991 with the amendments to § 1981 contained therein, it believed that the applicable state statute of limitations for personal injury claims would continue to apply to § 1981 claims:

> But under 42 U.S.C. section 1981, which bars intentional race discrimination in employment as well as other contractual relations, victims have a longer period of time to commence suits. In the absence of an express limitations period in section 1981, courts applying the statute have looked to analogous state statutes

> of limitations. These statutes typically allow two or three years, and allow up to six years in some states.

H.R. Rep. No. 102-40 (I), at 63 (1991). Consequently, although Congress had enacted § 1658 the year before, it did not view its passage as having altered the practice of borrowing state statutes of limitations for purposes of § 1981.

Finally, we also are persuaded by the considered opinions of two of our sister circuits that adopted the approach set forth here. In *Zubi* and *IBP*, the Third and Eighth Circuits both concluded that § 1658 did not affect the statute of limitations for § 1981 claims such as those brought by the plaintiffs. Those courts determined that it is "only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Zubi*, 219 F.3d at 225; *IBP*, 257 F.3d at 798 (quoting same). Because "the Civil Rights Act of 1991 was not the type of enactment Congress intended to include in the § 1658 four year limitations period," those courts applied the personal injury statute of the forum state. *IBP*, 257 F.3d at 798. We join those circuits in determining that § 1658 does not provide the applicable statute of limitations for claims of discrimination based on actions occurring after the employment relationship is formed.[6] Instead, the statute of limitations for those claims,

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[6] For the reasons set forth in this opinion, we respectfully disagree with the decision of the Tenth Circuit in *Harris v. Allstate Insurance Co.*, 2002 U.S. App. LEXIS 16509, 2002 WL 1874825 (10th Cir. Aug. 15, 2002). In *Harris*, the Tenth Circuit drew heavily from the analysis of the district court in the present case and also of the dissenting judge in *Zubi*. Specifically, relying on the

as for all § 1981 claims, remains the most analogous statute of limitations, here Illinois' two-year statute of limitations for personal injuries.

Conclusion

28 U.S.C. § 1658, as it applies to claims brought pursuant to § 1981, is susceptible to more than one textually plausible reading. Based on the text, the structure of the statutes and the legislative history of those sections, we conclude that § 1658 does not apply to the plaintiffs' claims brought pursuant to § 1981. Consequently, the judgment of the district court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion. Donnelley may recover its costs on this appeal.

REVERSED AND REMANDED

---

district court's reasoning that the Civil Rights Act of 1991 was an "Act of Congress enacted" after December 1, 1990, the Tenth Circuit held that " § 1658 applies to claims brought under § 1981(b), but not to claims brought under § 1981(a)." 2002 U.S. App. LEXIS 16509, [WL] at *6-9. As noted above, however, we do not believe the plaintiffs' claims "arise under" only § 1981(b), and, therefore, courts must look to the text, structure and purpose of both § 1981 and § 1658 to determine the correct statute of limitations. When this more complete context is considered, we believe that the correct statute of limitations for all § 1981 actions is the closest analogous state statute of limitations.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3271

[Filed November 21, 2002]

EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, et al., Plaintiffs-Appellees,	)
v.	)
R.R. DONNELLEY & SONS COMPANY, a Delaware corporation, Defendant-Appellant.	)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 96 C 7717
Matthew F. Kennelly, Judge

JUDGES:
Before Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

Upon consideration of the Plaintiffs-Appellees' petition for rehearing *en banc*, filed on September 27, 2002, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing *en banc* is hereby DENIED.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 19, 2003

Ms. H. Candace Gorman
542 S. Dearborn
Suite 1060
Chicago, IL 60605

Re: Edith Jones, et al., on Behalf of Herself and a Class of Others Similarly Situated
v. R. R. Donnelley & Sons Company
No. 02-1205

Dear Ms. Gorman:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Sincerely,

/s/ _____
William K. Suter, Clerk

Supreme Court, U.S.
FILED
JUL 31 2003
OFFICE OF THE CLERK

No. 02-1205

In the Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED,
Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY, A DELAWARE CORPORATION,
Respondent.

SCANNED
AUG 06 2003

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED FOR REVIEW

Does the four-year "catch-all" limitations period of 28 U.S.C. §1658 apply to new causes of action created by Public Law 102-166, 105 Stat. 1071, the Civil Rights Act of 1991, which were codified at 42 U.S.C. §1981(a) and (b)?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners are, EDITH JONES, EUNICE YOUNG, VIRGINIA CLARK, DOROTHY JEAN EPPS, ELLIS JACKSON, SR., ETHYL WILLIAMS, WILLIE MOORE, EDDIE MCGEE, JAMES NEVILS, JR., JOSEPH BEVILL, SR., MARY BECKUM, CLARENCE BOLDS, EDITH BOWLES, CURTIS BROWN, TOM GRIFFIN, MARGIE HARRIS, MAURICE HAYES, ALBERT JACKSON, VENNIE LAWSON, RAYMOND LEWIS, HELLEN HARRIS, DAVID ARMSTRONG, DONNA BENNETT, ALBERT WALKER, ROSE M. SMITH, JOSEPHINE LOVE, FLOYD POPE, ERNESTIN JAMISON, TOMMY MOORE, RECHINNA SHELTON, FRANK MORRIS, VIEEN LEE, ELMORE DOBSON, ROSIE SMITH JAMES STROUD, EUNICE SIMON, HAROLD SMITH, RICHARD MEBANE, CHARLES COLLIER, PHIL JAMES, LOTTIE SHELTON, EDGAR PATTON, ROBERT JACKSON, THLEMA TOWNSEND, LUTHER WARD, JUANITA WALKER, THELMA WESTBROOK, GERALDINE CRENSHAW, GLENDA BELL, FLOYD POPE, JOHN W. ADAMS, JAMES S. ADAMS, JAMES TATE, LUELLA BRADFORD, CHARLIE MAE GILREATH, ERTHA HAYNES, ANNIE WELLS, CATHERINE JAMES, MELVIN HAMILTON, WENDELL SHUMATE, JOHN GREGORY, CLEVELAND ROBERTSON, CHARLES HARRIS, EVELYYN FOSTER, DONALD GRUNDY, RONALD CARTER, OTIS MIXON, ROOSEVELT DIXON, HARVEY MORRIS, THELMA TOWNSEND, ALBERT T. WALKER, BRENDA WASHINGTON, PEARLIE BENNETT, MAURICE JACKSON, ALICE F. JONES SMITH, PATRICIA LUCCADO, EDITH J. BOWLES, MILDRED SADDER, EVELYN FOSTER, JUANITA

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Respondent

R.R. Donnelley is a corporation, which is publicly traded. Petitioners are unaware of any publicly traded company that owns ten (10%) percent or more of said corporation's stock. Respondent Donnelley was the defendant in the District Court and the Appellant in the Seventh Circuit Court of Appeals.

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OPINIONS BELOW

The Seventh Circuit order denying the timely petition for rehearing and rehearing *en banc* is at J.A. 102. The Seventh Circuit opinion is reported at *Jones et al v. R.R. Donnelley* 305 F.3d 717 (7th Cir. 2002). (J.A. 77) The District Court opinion is reported at *Jones et. al. v. R.R. Donnelley*, 149 F.Supp.2d 459 (N.D.Il. 2001). (J.A. 22)

JURISDICTION

The opinion of the Seventh Circuit was decided on September 16, 2002. (J.A. 77) The Court of Appeals entered an order denying a timely petition for rehearing and rehearing *en banc* on November 21, 2002. (J.A. 102)

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Certiorari was granted on May 19, 2003. (J.A. 104)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. Public Law 102-166, 105 Stat. 1071 (Civil Rights Act of 1991, codified at 42 U.S.C. § 1981 (a) (b) and (c));

B. Revised Statutes § 1977 (42 U.S.C. § 1981, Civil Rights Act of 1866);

C. Public Law 101-650, § 313 (28 U.S.C. § 1658, Judicial Improvements Act of 1990, as amended).

Public Law 102-166, 105 Stat. 1071 (42 U.S.C. § 1981(a) and (b) of the Civil Rights Act of 1991) provides:

a. Sec. 101. Prohibition Against All Racial Discrimination In The Making And Enforcement Of Contracts.

b. Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended–

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Revised Statutes § 1977 (42 U.S.C. § 1981; Civil Rights Act of 1866) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws

> and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Public Law 101-650 § 313 (28 U.S.C. § 1658, Judicial Improvements Act of 1990) which was enacted on December 1, 1990, contained only section (a) and was subsequently amended in July 2002 (Pub. L. 107-204) to add section (b), and provides:

> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.
>
> (b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of–
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

STATEMENT OF THE CASE

This case was filed on November 25, 1996 as a nationwide class action alleging race discrimination under § 1981(b) of the Civil Rights Act of 1991. (J.A. Rel. Doc. E.

1) All of the Plaintiffs who remain in this lawsuit[1] were fired between November 25, 1992 and November 25, 1994. (J.A. 78) Under Illinois' two-year personal injury statute these plaintiffs would not have timely claims.[2] Their claims include discrimination in discharge, discrimination in employee status and racial harassment. (J.A. 79)

The discharge claims relate to the shutdown of Defendant's Chicago Manufacturing Division, (hereinafter, CMD) which took place during the period of January 1993 through early 1995. (J.A. Rel. Doc. E. 102, p.2) During that time period R.R. Donnelley terminated approximately 575 African-American employees from the CMD. (J.A. 14, ¶ 24) The data produced by Donnelley shows that 31% of all white employees were transferred to other divisions, while only 1.2% of the African-American employees were transferred. (J.A. 14, ¶ 24) In addition, Donnelley had a practice of using its African-American employees as "temporary" or "casual" employees to keep them from retaining the same benefits and job security as the white employees. (J.A. 12-13, ¶¶ 12-14) The average tenure of the "temporary" employee was almost 11 years and the temporary and casual employees were more than 94% African-American. (J.A. 12 ¶ 13) The remaining claims relate to the racial harassment that went unchecked at the CMD up to and including the time of the shutdown. (J.A. 78-79)

Defendant filed a motion for partial summary judgment against those Plaintiffs whose employment terminated prior to

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[1] Settlement was reached on behalf of the individuals and classes not affected by the statute of limitations issue (J.A. Rel. Doc. E. 294).

[2] 735 ILCS § 5/ 13-202.

November 26, 1994 (the two-year Illinois personal injury statute of limitations). (J.A. Rel. Doc. E. 10) Plaintiffs responded by asserting that their claim relied on §1981(b) of the 1991 Civil Rights Act and that the proper statute of limitations under the 1991 Civil Rights Act was four years instead of two because of Congress' passage of the Judicial Improvements Act (which provided for a four year catch-all statute of limitations for Acts of Congress enacted after December 1st, 1990). Plaintiffs made alternative arguments that equitable estoppel and equitable tolling should apply because Plaintiffs were not aware that race was being used as a criteria in the selection of employees for transfer to other Donnelley divisions. (J.A. Rel. Doc. E. 102)

The Honorable Ann Williams[3] denied Defendant's Motion for Summary Judgment, but did not reach the issue of the four-year statute of limitations because the Court found that Plaintiffs were entitled to argue both equitable tolling and equitable estoppel. (J.A. Rel. Doc. E. 149) After the District Court's ruling on the Plaintiffs' Class Certification Motion, the Honorable District Court Judge Matthew Kennelly entertained briefs on the question of the appropriate statute of limitations. (J.A. Rel. Doc. E. 201-235) After extensive briefings Judge Kennelly held that the statute of limitations for a claim under §1981(b) of the Civil Rights Act of 1991 is controlled by the "catch-all" statute of limitations codified at 28 U.S.C. §1658, (Judicial Improvements Act of 1990, as amended) and is thus four years. (J.A. 22) Because this cause of action was filed on November 25, 1996, the statute of

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[3] At the time Judge Williams was the District Court Judge assigned to the case. When Judge Williams was appointed to the Seventh Circuit the case was reassigned to the Hon. Matthew J. Kennelly.

limitations under Judge Kennelly's ruling reaches back to November 25, 1992. (J.A. 40) All claims in this lawsuit fall under the 1991 Civil Rights Act and are timely under the four-year statute.

Defendant sought certification to the Seventh Circuit on the question of the proper statute of limitations, which the District Court granted and the Seventh Circuit accepted. (J.A. 35, J.A. 45, J.A. 75) The Seventh Circuit reversed the decision of the District Court, holding that Congress intended to have §1658(a) apply only when Congress establishes a new cause of action and §1658 does not apply to statutes that have "roots in" or "otherwise reference" laws that preexist §1658. *Jones v. R.R. Donnelley*, 305 F.3d 717, 728 (7th Cir. 2002). (J.A. 96)

Plaintiffs therefore timely petitioned for rehearing and rehearing *en banc*, which was denied on November 21, 2002. (J.A. 102) A timely petition for a writ of certiorari was filed and this Court granted that petition on May 19, 2003. (J.A. 104)

SUMMARY OF ARGUMENT

Following years of complaints by the federal judiciary about the burden on the federal courts of dealing with state statutes of limitations in "borrowing" situations, Congress passed the Judicial Improvements Act of 1990, which provided a four-year statute of limitations for civil actions arising under an Act of Congress enacted after December 1, 1990. Plaintiffs filed this case on November 25, 1996 relying on § 1981(b) of the Civil Rights Act of 1991; a statute enacted almost a year after the Judicial Improvements Act of 1990 was passed. The events complained of by Plaintiffs were not viable causes of action until the 1991 Civil Rights Act was

enacted. For these reasons, the Plaintiffs are properly subject to the statute of limitations found in the Judicial Improvements Act. (J.A. Rel. Doc. E. 1) All of the Plaintiffs and class members that remain in this case have timely claims under the four-year statute of limitations found in §1658 but almost none of these same Plaintiffs and class members would be timely under Illinois' two-year personal injury statute.[4]

The plain language of the applicable section of §1658 supports Plaintiffs' argument, as the relevant part[5] of the statute is one sentence, which reads as follows: " (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. §1658(a).

Donnelley argued, and the Seventh Circuit agreed, that §1658 was ambiguous and susceptible to more than one interpretation. The Seventh Circuit held that Congress could not have *intended* §1658(a) to apply to causes of action that had roots in previous laws. That Court then went on to hold that §1658 would only apply to laws that "exclusively" arise from *new* acts of Congress that do not have "roots in" or

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[4] The equitable estoppel and equitable tolling ruling still applies to the claims of those Plaintiffs who did not know about the secret transfer of white employees at the time the transfers were taking place. Under that ruling extensive discovery would need to be conducted to determine which plaintiffs could benefit from that ruling and which would be dismissed as not being timely under the two-year statute.

[5] §1658 was amended in 2002 to alter the statute of limitations under the Sarbanes-Oxley Act. (Pub. L. 107-204)

"reference laws" that preexisted §1658. *Jones v. R.R. Donnelley*, 305 F.3d 717, 728 (7th Cir. 2002).

The argument that §1658 cannot be applied to statutes that have roots in or reference previous laws must fail because such an analysis ignores the plain language of the statute, the intent of Congress, and the way in which Congress enacts causes of action which is often by amendment. Such an analysis would render §1658 a virtual dead letter.

ARGUMENT

I. INTRODUCTION

The plain language of the Judicial Improvements Act of 1990, the intent of Congress in passing that Act, and the unfortunate consequences that would otherwise ensue show that the general four-year statute of limitations in the Judicial Improvements Act applies to actions brought under the Civil Rights Act of 1991. This Court has already held that §1981 of the 1991 Civil Rights Act could not be applied retroactively because it created an entirely new cause of action, conferring new rights that never before existed, as opposed to simply clarifying an existing law. *Rivers v. Roadway Express*, 511 U.S. 298, 311 (1994). Because the Civil Rights Act of 1991 was a new law, enacted almost a year after §1658, the same principle that governed *Rivers* governs this case, that is, "a principle which has always been held sacred in the United States that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the Act shall render such construction indispensable." *Reynolds v. M'Arthur*, 27 U.S. (2 Pet.) 417, 434 (1829) (Marshall, J.). As Plaintiffs' claims did not exist until Congress enacted the 1991 Civil Rights Act, the four-year statute of limitations found in the

Judicial Improvements Act of 1990 applies to their cause of action.

A. Under the Plain Language of §1658, the Four-Year Statute of Limitations Should Apply to Plaintiffs' Cause of Action and the Seventh Circuit Was Wrong to Insert Words Not Found in the Statute.

28 U.S.C. §1658 was enacted on December 1, 1990, as part of the Judicial Improvements Act of 1990. The original Act reads as follows: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than four years after the cause of action accrues."[6] 28 U.S.C. §1658.

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[6] §1658 was amended on July 30, 2002 to create an exception for certain new cause of action that arises under the Securities Exchange Act of 1934. The Act now reads:

> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.
>
> (b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of-
>
> (1) 2 years after the discovery of the facts constituting the violation; or
> (2) 5 years after such violation.

This Court has long held that the plain language of a statute should be the stopping point in the analysis: "In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it." *Schooner Paulina's Cargo v. United States*, 11 U.S. 52, 60 (1812).

> "Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation." ... "When the language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision."

U. S. v. Temple, 105 U.S. 97, 99 (1881) (cites omitted); *See also, Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990), citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "[I]f the intent of [a statute] is clear," then the plain meaning is conclusive and the analysis need proceed no further. *Norfolk & Western Ry. Co. v. American Train Dispatchers*, 499 U.S. 117, 128 (1991), *quoting, Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997).

The year after Congress passed the Judicial Improvements Act, Congress enacted Public Law 102-166, § 101, 105 Stat. 1071, which was codified at §1981 (a) (b) and (c) as part of the Civil Rights Act of 1991. Part of the purpose for enacting the 1991 Civil Rights Act was "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination," (42 U.S.C. 1981, §3(4)),

following this Court's ruling in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) and other Supreme Court cases.[7] The 1991 Act not only increased liability but also established a new standard of conduct. *Rivers v. Roadway Express*, 511 U.S. 298, 304 (1994).

Plaintiffs filed their lawsuit under the 1991 Civil Rights Act, six years after the Judicial Improvements Act was passed by Congress. The District Court held that the four-year statute of limitations under §1658 of the Judicial Improvements Act unambiguously applied to Plaintiffs' claims under the 1991 Civil Rights Act and that despite court decisions to the contrary, §1658 was not susceptible to more than one reasonable interpretation. *Jones et.al. v. R.R. Donnelley*, 149 F. Supp.2d 459, 464 (N.D.Ill. 2001) "'Enact' means to make into law by authoritative act, Black's Law Dictionary 546 (7th Ed. 1999); thus every Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is 'enacted.'" *Id.* The Civil Rights Act of 1991 was plainly an enacted "Act of Congress", as Congress specifically used both words in the law's preamble, including using the phrase "be it enacted." *Id.* Additionally, there is no question that a "civil action" as used in §1658 is commenced by the filing of a complaint. (*See*, Fed. R. Civ. P. 2, 3)

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[7] In *Patterson*, this Court held that the words "to make" contracts limited §1981 to discrimination only in the formation of a contract not to problems that may later arise from the conditions of continuing employment. *Patterson v. McLean Credit Union*, 491 U.S. at 176-77. This deemed non-actionable post-contract claims of discrimination in the terms and conditions of employment, such as the claims that Plaintiffs raise in this case.

"Arising under" is a term of art that has been used by this Court and Congress since the framing of our Constitution.[8] By the time Congress enacted §1658, the phrase "arising under" had been used by Congress in hundreds of federal statutes and this Court has interpreted that language to mean that a claim arises under federal law if reliance on that law would be a proper part of a "well pleaded complaint". *Gully v. First National Bank of Meridian*, 299 U.S. 109, 112 (1936). That federal law "must be an element, and an essential one of the Plaintiff's cause of action." *Id.*

Perhaps the most important of the statutes using the phrase "arising under" is 28 U.S.C. § 1331, which confers on federal district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Only a year ago this Court again relied on §1331 case law in construing a similarly worded provision of Title 28:

> Section 1338(a) uses the same operative language as 28 U.S.C. § 1331, the statute conferring federal-question jurisdiction, which gives the district courts "original jurisdiction of all civil actions *arising under* the Constitution, law, or treaties of the United States." (Emphasis added.) We said in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 808 (1988), that "[l]inguistic consistency" requires us to apply the same test to determine whether a case arises under § 1338(a) as under § 1331.

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[8] Article III of the Constitution extends the judicial power to "cases . . . arising under this Constitution, the laws of the United States, and treaties made . . . under their authority."

Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc., 535 U.S. 826, 829-30 (2002).

> The use of the phrase "cases and controversies arising under" . . . is strong evidence that Congress intended to borrow the body of decisional law that has developed under 28 U.S.C.A. § 1331 and other grants of jurisdiction to the district courts over cases "arising under" various regulatory statutes. . . . The traditional meaning associated with these words could hardly have been overlooked.

Coastal States Mktg., Inc. v. New England Petroleum Corp., 604 F. 2d 179, 183 (2nd Cir. 1979).

Plaintiffs' complaint relies on the 1991 Civil Rights Act and §1981(b) is an essential element of Plaintiffs' cause of action. (J.A. 9) The remedies requested, compensatory and punitive damages and declaratory and injunctive relief, are all "sought pursuant to 42 U.S.C. subsection 1981(b)."[9] Every reference in the complaint to the 19th century civil rights act[10] is followed by the phrase "as amended by the 1991 Civil Rights Act (Section 1981(b))."[11] Without §1981(b) most, if not all, of Plaintiffs' claims would not have been actionable following this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

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[9] Second Amended Complaint (J.A. 10)

[10] The complaint mistakenly refers to the Civil Rights Act of 1871. The Act in question was adopted in 1866. (J.A. 10)

[11] Second Amended complaint (J.A. 10)

Despite the fact that Plaintiffs' well pleaded complaint clearly relies on §1981(b) of the Civil Rights Act of 1991 and that §1658 clearly states that the statute of limitations is four years, "unless otherwise provided by law", as to "a civil action arising under an Act of Congress enacted after the date of the enactment of this section", the Seventh Circuit has inserted into §1658 the phrase "without reference to preexisting law," (*Jones et.al. v. R.R. Donnelley*, 305 F.3d 717, 726 (7th Cir. 2002)) and thereby completely changed the intent of Congress and made §1658, in effect, a nullity.

The Seventh Circuit, in inserting the above language, held that the plain language of §1658 does not address the "eventuality when a cause of action arises under two different acts, one enacted before and one enacted after the effective date of §1658". *Id.* at 724. However, by 1990 the established meaning of "arising under" clearly encompassed actions which arose only in part from the law or laws in question and therefore the failure of Congress to include any such express limitation in §1658 can only have been deliberate. Instead of imposing any such limitation on the sweep of §1658, or inviting the courts to fashion additional limitations, Congress prefaced §1658 with the words "[e]xcept as otherwise provided *by law*." 28 U.S.C. §1658 (Emphasis added). Congress clearly contemplated that any exception to the four-year rule would be based on an express statutory provision.

Appellees also respectfully disagree with the Seventh Circuit's premise that Plaintiffs' claims fall under two Acts. They do not. Plaintiffs' cause of action falls under *one act*, the 1991 Civil Rights Act, and as this Court said in *Rivers*, the fact that the new act is framed "as a gloss on Sec. 1981's original make and enforce contract language" does not alter the fact that the 1991 law is a new law. *Rivers v. Roadway*

Express, 511 U.S. 298, 308 (1994). The Civil Rights Act of 1991 was clearly enacted after §1658 and until that Act Plaintiffs did not have a cause of action. Lastly, §1658, as amended in 2002, *does* address the situation of when a cause of action arises under two different acts, and the statute clearly shows that Acts of Congress enacted after December 1, 1990, which have their roots in pre-existing statutes, are subject to the four-year statute, unless specifically exempted.

This Court should reject the Seventh Circuit's decision that we ignore §1658 for all legislation passed after December 1, 1990, if that legislation has roots in or is otherwise dependent on, provisions of any Act that predates §1658. *Jones et.al. v. R.R. Donnelley*, 305 F.3d at 725 n.5. That interpretation requires us to ignore the plain language of §1658 and exclude amendments that create entirely new causes of action (like this one) and any new causes of action that refer or relate to previous Acts. Plaintiffs respectfully submit that such an interpretation is untenable. As this Court recognized in *Rivers*, "altering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes." *Rivers*, 511 U.S. at 308. Surely this Court does not want to be in the position of requiring Congress to pass completely new sections of the Code each time it enacts legislation in order to achieve the result Congress clearly stated in §1658.

In addition, this Court has already recognized the plain and unambiguous language of §1658 when it explained that "[t]he expectation [of borrowing limitations from state law] is reversed for statutes passed after December 1, 1990, the effective date of 28 U.S.C. §1658...which supplies a general, four-year limitations period for *any federal statute* subsequently enacted without one of its own." *North Star*

Steel Co. v. Thomas, 515 U.S. 29, 34 n.1 (1995) (Emphasis added).

Because the expectation of borrowing limitations are now reversed, both this Court and Congress require that before a state statute of limitations can be applied to a civil rights claim, there *must* be an examination of whether there is an applicable federal rule or statute. (*See*, *Wilson v. Garcia* 471 U.S. 261, 268-269 (1985); *Chardon v. Fumero Soto* 462 U.S. 650, 663 (1983) (Rehnquist, J., dissenting)("If there is any federal law 'adapted to the object' of the civil rights laws, 42 U.S.C. § 1988 commands that federal courts apply that law in civil rights actions."); *Young v. Sabbatine*, 142 F.3d 438 (6th Cir. 1998)(remanding case to lower court to consider whether §1658 required the application of the four-year statute of limitations to §1981 claims.)) Such an examination unequivocally shows that §1658 is the appropriate federal statute to be applied for claims under §1981 of the 1991 Civil Rights Act.

This Court has stated "time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."..."When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"..."[J]udicial inquiry into the applicability of [a statute] begins and ends with what [a statute] says and with what [statute] does not." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-4 (1992). In *Jones*, the District Court found that, "looking at the plain language of §1658, this seems to this Court to be an easy answer". *Jones et.al. v. R.R. Donnelley*, 149 F.Supp.2d 459, 462 (N.D.Ill. 2001).

B. The Intent of Congress in Passing §1658 Was to Simplify the Judiciary's Task in Determining Statutes of Limitation for Federal Laws, but the Seventh Circuit's Decision Thwarts That Intent by Creating a Complicated, Virtually Unworkable Rule.

Prior to the enactment of §1658 this Court expressed frustration with Congress' failure to enact statues of limitation with the statutes it passed and its failure to enact a uniform federal statutes of limitations. "The court is presented with this task [of determining the appropriate statute of limitations] because Congress has seen fit not to prescribe a specific statute of limitations to govern actions under most of the federal civil rights statutes, instead directing courts to apply state law if 'not inconsistent with federal law.'" *Burnett et.al. v. Grattan*, 468 U.S. 42, 56 (1984)(Rehnquist, J., O'Connor, J., concurring in judgment) Additionally, The Seventh Circuit and other lower courts expressed their desire that Congress enact federal limitation periods. "We join the growing number of commentators and courts who have called upon Congress to eliminate these complex cases, that do much to consume the time and energies of judges but that do little to advance the cause of justice, by enacting federal limitations periods for all federal causes of action." *Sentry Corp. v. Harris*, 802 F.2d 229, 246 (7th Cir. 1986); *see also, London v. Coopers & Lybrand*, 644 F.2d 811, 813 (9th Cir. 1981).

In response, Congress established the Federal Courts Study Committee, which issued a report critical of the practice of borrowing from state statutes. That committee recommended that Congress adopt uniform limitations periods for federal claims rather than "borrowing" the most analogous state law limitations period. The House Report explained the problems such borrowing had created:

> It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitations periods.

H.R. Rep. No. 101-734, p. 24 (1990), (*quoting* Fed. Courts Study Comm., Judicial Conference of the U.S., Report of the Federal Courts Study Committee, 93 (1990)).

Congress answered that call with the passage of 28 U.S.C. §1658 and although Congress only enacted §1658 prospectively, the statute clearly states that it applies to *all* Acts of Congress enacted after December 1, 1990. Under the Seventh Circuit's decision, however, the ameliorative function of §1658 has been replaced by a complex, virtually unworkable rule, forcing litigants to scour the legislative history of all new acts of Congress to determine if they are "really" new or if they have roots in or otherwise reference preexisting law.

The Seventh Circuit's expansive reading of an exception to §1658 means that many of the new statutes that have been created by Congress since 1990, and many of the new statutes that will be created in the decades ahead, will remain subject to the borrowing of state limitations rules which Congress thought it had ended in 1990. The Seventh Circuit has identified three different types of post-1990 claims to which, on its view, the four-year limitation period will not apply: (a) claims contained in laws which "amen[d] a statute existing before [December 1, 1990]", (b) claims that "reference . . . preexisting law", and (c) claims based on a post-1990 standard of conduct enforced through a pre-1990 "right to recovery." (J.A. 97-98) Much of the legislation Congress has

adopted since 1990 falls within one or more of these three categories.

It is unlikely that Congress contemplated that statutes enacted a decade or more after the adoption of §1658 would still be the subject to the very borrowing of state limitations periods which §1658 was adopted to end. Under the Seventh Circuit's decision the use of borrowed state limitations periods, with the very attendant problems that Congress sought to avoid, will continue into the indefinite future with regard to other new legislation.

C. This Court Held in *Rivers* That § 1981 of the 1991 Civil Rights Act Created an Entirely New Cause of Action and the Seventh Circuit's Decision Conflicts with That Holding.

As this Court has held, it is "emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); and in *Patterson* this Court determined *not* that §1981 should be narrowed despite its original intent, but rather that the 1866 statute was never meant to reach certain types of actions. *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77 (1989). As mentioned above, Congress enacted the Civil Rights Act of 1991 partly in response to this Court's *Patterson* decision. In the Civil Rights Act of 1991, Congress enlarged the category of conduct embraced by the old §1981 by inserting that section and adding two new subsections §1981 (b) and (c), so that the complete text of the new law now reads:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be

parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exaction's of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" *includes the making, performance, modification, and termination of contracts, and* the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981(a)(b) and (c). (Emphasis added)

Consistent with the *Patterson* decision, this Court recognized that §1981(b) created an entirely new cause of action in *Rivers v. Roadway Express*, 511 U.S. 298, 313-14 (1994), when this Court decided that the 1991 Civil Rights Act should not be applied retroactively. This Court found that the Act "enlarged the category of conduct that is subject to §1981 liability," *Id.* at 303, and that its statement of purposes, instead of referring to "restoring" preexisting rights, describes the Act's function as "expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.* at 308. Without the enactment of the Civil Rights Act of 1991, most if not all, of Plaintiffs' claims in this case would not have existed.

The Seventh Circuit's finding that §1981(b) is solely "definitional" (*Jones v. R.R. Donnelley*, 305 F.3d at 727) conflicts in principle with this Courts' decision in *Rivers* and undermines the breath and extent of the 1991 Civil Rights Act. When Congress enacted the Civil Rights Act of 1991, subsection (b) changed the very essence of the language codified as subsection (a). The fact that this Court found that the Civil Rights Act of 1991 was not retroactive showed unequivocally that the new law was not an explanation of an old act, but instead created new causes of action that were not cognizable under the pre-1991 version of the statute. *Rivers*, at 313. As mentioned above, this Court stated in *Rivers*, "the fact that Section 101 is framed as a gloss on Section 1981's original make and enforce contract language does not demonstrate an intent to apply the new definition to past acts." *Id.* at 308. If, as this Court has stated, we cannot apply the "new definition to past acts," how then can we apply the old definition to new acts?

Because this Court has already found that the 1991 Civil Rights Act could not be applied retroactively because it was a new law that established a new standard of conduct expanding the rights previously allowed under §1981, it must be subject to the plain language of §1658, which establishes a four-year statute of limitations for Acts of Congress enacted after December 1, 1990.

D. Contrary to the Seventh Circuit's Holding, the Legislative History Confirms That Congress Intended to Create a Default Federal Statute of Limitations for *All* Statutes Enacted after December 1, 1990 and the Seventh Circuit Should Not Have Substituted its Desire for Congress' Intent.

Even if this Court should find that the plain language of the statute is somehow ambiguous, the Seventh Circuit's decision is inconsistent with the legislative history of both §1658 and §1981(b). In a statement on the floor of the Senate, the sponsor of the Judicial Improvements Act quoted from the report of the Judicial Conference Of The United States, Report of The Federal Courts Study Committee 93 (1990) and expressed the desire of Congress to do away with the practice of borrowing statutes of limitations. 136 Cong. Rec. S17581 (1990).

There is nothing in the congressional history that even remotely suggests that Congress did not intend to subject *all* Acts of Congress enacted after December 1, 1990, to the legislation. Even the Title, which is "Time Limitations on the Commencement of Civil Actions Arising Under Acts of Congress," shows that Congress' intent was to set a statute of limitations for lawsuits filed under Acts of Congress enacted after the effective date of that Act. *Id.* Although the title of an Act cannot control the plain words in the body of the statute, it can help assist in removing ambiguities. (*See, U.S. v. Fisher*, 6 U.S. 358, 386 (1805): "where the intent is plain, nothing is left to construction. Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration.")

Similarly, the Seventh Circuit's finding that the District Court's interpretation was contrary to the "dispositive" legislative history of the 1991 Civil Rights Act because of discussions in the congressional history regarding the fact that §1981 actions have longer statutes of limitations than Title VII claims, is not only incorrect, but ignores the clear intent of Congress to establish a federal uniform statute and do away with "borrowing" for all new acts of Congress. *Jones et.al. v. R.R. Donnelley*, 305 F.3d 717, 727 (7th Cir. 2002). The section of the sparse legislative history relied on by the Seventh Circuit does not suggest that Congress intended to override §1658, as it is nothing more than a few stray comments, (more than six months prior to the passage of the 1991 Civil Rights Act) discussing how the limitations under §1981 *had been* applied by the courts. The entire paragraph in question is set out below; the portion selectively quoted by the Seventh Circuit is italicized:

> Current law provides for a generally longer statute of limitations for claims of intentional discrimination based on race than for other forms of employment discrimination. Title VII provides that an employment discrimination claim must be filed within 180 days following the alleged unlawful employment practice (300 days if the charge is filed with a state or local agency). *But under 42 U.S.C. section 1981, which bars intentional race discrimination in employment as well as other contractual relations, victims have a longer period of time to commence suits. In the absence of an express limitations period in section 1981, courts applying the statute have looked to analogous state statutes of limitations. These statutes allow two or three years, and allow up to six years in some states.* Thus, under current law, women, religious minorities and members of other protected

> groups must file claims within 180 days while victims of intentional race discrimination may still commence suit under section 1981 long after the expiration of this period. This disparity serves no purpose.

H. R. Rep. No. 102-40(I) (1991).

Read in context, the three sentences relied on by the Court of Appeals have nothing whatsoever to do with the as yet not enacted §1981(b) claims, and assuredly do not purport to address whether state limitations rules "would . . . apply" to such claims. This "legislative history" that precedes the enactment of the 1991 Civil Rights Act by more than six months is not sufficient to overcome the clear language of the actual statute. If Congress had intended to override §1658, it would and must have done so expressly, as Congress did with the Sarbanes-Oxley Act, when Congress amended §1658 in 2002.

As evidenced by the amended §1658, Congress clearly understood that the uniform statute of limitations act *would* apply to new Acts of Congress that reference preexisting statutes, absent congressional action to the contrary. Congress recognized that claims under the Sarbanes-Oxley Act of 2002 (Pub. L. 107-204), which was an amendment to the Securities Exchange Act of 1934, would have been subject to the four-year statute under §1658, unless specifically excluded.

Additionally, the Seventh Circuit's policy pronouncements that the application of the four-year statute to §1981(b) claims would "threaten to disrupt the settled expectations of a great many parties" and would create confusion because "unsuspecting plaintiffs who have relied on established precedent" would find themselves barred from relief and

defendants would find themselves "faced with potential liability on claims they believed extinguished," although commendable for the concerns raised, they simply cannot overcome the express Congressional enactment. *Jones et.al. v. R.R. Donnelley*, 305 F.3d at 728, quoting *Zubi v. AT&T*, 219 F.3d 220, 224 (3rd Cir. 2000). As Justice Marshall said in *U.S. v. Fisher et al.*, 6 U.S. 358, 389 (1805):

> But where only a political regulation is made, which is inconvenient, if the intention of the legislature be expressed in terms which are sufficiently intelligible to leave no doubt in the mind when the words are taken in their ordinary sense, it would be going a great way to say that a constrained interpretation must be put upon them, to avoid an inconvenience which ought to have been contemplated in the legislature when the act was passed, and which, in their opinion, was probably overbalanced by the particular advantages it was calculated to produce.

The dissent in the Third Circuits' *Zubi* decision also noted that, in interpreting a statute, courts must seek to determine what Congress intended, and not what they believe is the best approach. "It is by now axiomatic that 'the judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations..." *Zubi v. AT&T*, 219 F.3d at 231. (Alito, J., dissenting)(citations omitted).

Finally, and contrary to the Seventh Circuit's supposition, there were no "settled expectations" for post contract relief prior to the 1991 Civil Rights Act because there was no cause of action under §1981 for those claims prior to that Act. Again, as the dissent noted in *Zubi* at 231:

Before the enactment of the Civil Rights Act of 1991, no employer in New Jersey could have had a settled expectation that an action for discriminatory discharge brought under § 1981 would be subject to the state's two year statute of limitation for personal injury actions, since prior to that time, §1981 did not authorize such an action at all. It was not until the 1991 Act that such an action was possible, and by that point §1658 had been enacted. ... the single, general statement cited by the majority cannot bear the weight of the majority's interpretation.

E. If the Seventh Circuit's Rationale Is Accepted, There Will Be a Free for All in the Courts as Litigants on Both Sides Scour the History of Each New Statute to Determine If it Has "Roots In" or "References" Old Law.

Although petitioners' question is limited to the application of § 1658 to 42 U.S.C. § 1981, this Court's interpretation of that question will be guiding on other areas of the law and other causes of action enacted after §1658. The consequences of the Seventh Circuit's holding will in effect nullify §1658 because, as stated above, nearly all Acts of Congress have "roots in" or "otherwise reference" preexisting law. Although the list of legislation with private rights of action which have "roots in" or which "otherwise reference" previous laws could go on *ad nauseum*, examples include the Telecommunications Act of 1996 (Pub. L. 104-104, codified at 47 U.S.C. § 160 *et seq*), the Uniform Services Employment and Reemployment Rights Act of 1994 ("USERRA") (38 U.S.C. § 4301 *et. seq.*), the Air Transportation Safety and System Stabilization Act (Pub. L. 107-42), the Prosecutorial Remedies and Other Tools to End the Exploitation of Children

Today ("PROTECT") Act (Pub. L. 108-21), the Religious Land Use and Institutionalized Persons Act of 2000 (Pub. L. 108-24), the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (42 U.S.C. § 669A), the Driver's Privacy Protection Act (18 U.S.C. § 2724), the Freedom of Access to Clinic Entrances Act of 1994 (18 U.S.C. § 248), and Pub.L. 104-134, § 101(c) (adding a cause of action for persons injured by hazardous or injurious devices placed on federal lands to 18 U.S.C. § 1864). The challenge would be to find a statute creating a private right of action enacted after December 1, 1990 that does not have its own statute of limitations and which does not in any way have "roots in" or "otherwise reference" prior laws.

Under the Seventh Circuit's rationale, when Congress decides, for example, to enact federal legislation under §5 of the 14th Amendment, even though the legislation would be new, it would not be considered a new cause of action because its roots are in the Constitution. Ironically, even §1658 has its roots in the Justice Act of 1985 and could ultimately be traced back to the Judiciary Act of 1789. Under the Seventh Circuit's interpretation, most Acts of Congress *enacted after* §1658, that create new causes of action, without their own statute of limitations would not partake of the four-year statute because their roots are found in the Constitution or Acts of Congress that preceded § 1658.

The controversy regarding the applicable statute of limitations has already arisen under the Telecommunications Act of 1996 (47 U.S.C. § 160) (*See*, *MCI Tel. Corp. v. Illinois Bell*, 1998 WL 156674 (N.D. Ill. Mar. 31, 1998); *E. Spire Communications Inc. v. Baca*; 2003 WL 21537806 (D.N.M., June 12, 2003); *Verizon Maryland v. RCN Telecom Service*, 232 F.Supp.2d 539 (2002)), and under USERRA, 38 U.S.C. § 4301 (*See*, *Rogers v. City of San Antonio*, 2003 WL

1566502 (W.D. Tex., Mar. 4, 2003) and *Akhdary v. City Of Chattanooga*, 2002 WL 32060140 (E.D. Tenn., May 22, 2002)), both of which have "roots in" or "otherwise reference" laws enacted prior to December 1st, 1990. Given the number of statutes that have been enacted since December 1990, and the number of statutes which will continue to be enacted, that do not have their own statute of limitations, it is only a matter of time before this same question will plague other legislation as well.

II. CONCLUSION

For the reasons set forth herein and for such other reasons as this Court deems just and appropriate, Plaintiffs ask this Court to reverse the Seventh Circuit's decision and find that the four-year statute of limitations set forth in 28 U.S.C. §1658 applies to all civil actions arising under Public Law 102-166 § 101, 105 Stat. 1071, which was codified at §1981 (a) (b) and (c) whether or not those causes of action are amendments, have roots in, or otherwise reference earlier or preexisting law, and for such other and further relief as this Court deems just.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED,

Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

In a civil action alleging race discrimination in the "mak[ing] and enforc[ing]" of contracts under 42 U.S.C. § 1981, should a court continue to borrow the forum state's statute of limitations for personal injuries on all claims, see *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987), or instead apply that limitations rule only to "contract formation" claims and apply the "catch-all" four-year period of 28 U.S.C. § 1658 to other claims?

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RESPONDENT'S BRIEF ON THE MERITS

The issue here is the proper construction of 28 U.S.C. § 1658, which applies a four-year catch-all limitations period to civil actions "arising under" federal statutes enacted after December 1, 1990 that lack an explicit limitations period. Petitioners' claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts under 42 U.S.C. § 1981 "aris[e] under" statutory language in force since 1866 and now codified in § 1981(a) – and not under § 1981(b) which simply defines the "make and enforce" element of the cause of action enacted over a century ago.

Petitioners and the government, however, offer a different interpretation that is both superficial and flawed: (a) The phrase "arising under" has a plain, settled meaning under 28 U.S.C. § 1331 – that a case "arise[s] under" a federal law whenever that law "forms an ingredient of the original cause," *Osborn* v. *Bank of United States*, 22 U.S. (9 Wheat.) 738, 823 (1824) – and (b) this meaning must apply in § 1658.

In fact, under the most natural reading of § 1658 – and the one adopted by the Court of Appeals – petitioners' claims "arise under" the original statutory language of § 1981. At the very least, however, the phrase "arising under" is inherently ambiguous, and its meaning is driven by the context in which it appears and the purposes for which it is used. And, while the phrase "arising under" has a general meaning in the context of federal subject-matter jurisdiction, § 1658 does not address subject-matter jurisdiction, but the wholly different question of the appropriate limitations period. The meaning developed under § 1331, accordingly, cannot simply be transferred to § 1658 where it is employed for a distinct purpose.

In § 1658, Congress barred the application of the new four-year catch-all limitations period to statutory regimes in place on December 1, 1990, in order to preserve existing limitations

rules, while simultaneously providing clarity and certainty about limitations rules for statutory regimes enacted in the future. To effectuate this language and Congress's purposes, the Court should hold that a claim "aris[es] under" a statute enacted prior to December 1, 1990, when such a statute codifies the claim and has a settled limitations rule, and under a statute enacted after December 1, 1990, only when such a statute codifies an entirely new claim without an existing limitations rule.

Amendments to statutes enacted before December 1, 1990 do not alter the analysis. Interpreting § 1658 to abrogate established limitations rules for civil actions because of *any* post-December 1, 1990 amendment to the underlying claim would contravene Congress's intent to preserve existing rules, to enact clear limitations rules, and to reduce litigation. Petitioners' claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts thus "aris[e] under" the operative language of § 1981, which is more than a century old, and are governed by the settled limitations rule of *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 660 (1987) (plurality opinion).

The interpretation of § 1658 proposed by petitioners and the government not only undermines the statute's purposes, it also produces irrational, indeed absurd, results. "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitation." *Wilson* v. *Garcia*, 471 U.S. 261, 266 (1985) (quotations omitted). Yet, petitioners and the government say that claims "arising under" the same statutory subsection – § 1981(a) – have two different limitations periods. This anomalous situation will occur whenever Congress amends an existing statute that contains a private cause of action. In addition, courts will have to decide whether any claim "arising under" an amended statute is, in fact, new. In this case, it is clear that Congress expanded § 1981's scope by amendment; but that clarity will not usually exist and chaos will ensue when courts try to

ascertain newness after an amendment to a statute that is the subject of a circuit split or that lacks a definitive interpretation.

Moreover, for each post-December 1, 1990 enactment that creates "new" claims, as in this case, the parties will litigate, and courts will have to decide, whether the factual allegations state a newly meritorious or previously meritorious claim. Finally, if petitioners' and the government's test is accepted, the phrase "arising under" nonetheless may have to be interpreted differently when States are § 1981 defendants, because Congress did not clearly state that § 1658 applies to States.

There is no reason to give an ambiguous statute such a counter-productive interpretation. This Court should instead interpret § 1658, as the Court of Appeals did, to maintain settled limitations rules for existing statutory regimes, and to produce clarity and reduce litigation – *viz.*, to provide that a claim "aris[es] under" a post-December 1, 1990 statute only if such a statute codifies a wholly new claim without an existing limitations rule.

STATEMENT OF THE CASE

1. From its original enactment in the Civil Rights Act of 1866 and the Civil Rights Act of 1870[1] until today, the language now codified at 42 U.S.C. § 1981(a) has remained the same. It provides that "[a]ll persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." To state a claim under this law, a plaintiff has always been required to allege that (a) a person (b) within the jurisdiction of the United States (c) has been denied (d) the right to make and enforce contracts (e) that a

[1] *See* Section 1 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27; Section 16 of the Civil Rights Act of May 31, 1870, ch. 114, 16 Stat. 140, 144.

white citizen has. Section 1981 has never included an express statute of limitations; it has long been settled, however, that the courts should apply the forum state's limitations period for personal injury actions. See *Goodman*, 482 U.S. at 660-64; *Wilson*, 471 U.S. at 267.

Until 1989, the courts of appeals were divided on the question whether the phrase "make and enforce" contracts included discrimination following contract formation, including discriminatory termination. In 1989, however, this Court resolved that conflict when it held that the statutory ban on discrimination in the making and enforcement of contracts did not apply to conduct occurring after contract formation. *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989).

2. On December 1, 1990, Congress enacted a new catch-all statute of limitations for actions arising under federal statutes. See Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, tit. III, § 313(a), 104 Stat. 5104, 5114-15. It provided that:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues. [28 U.S.C. § 1658(a).]

This law did not enact the recommendation of the Federal Courts Study Committee, which had strongly urged Congress to enact a uniform limitations period that would apply in actions arising under *all* federal laws for which Congress had failed to state a limitations period. See *Report of the Federal Courts Study Committee* 93 (1990). Congress recognized that the practice of borrowing analogous state statutes of limitations for federal causes of action that do not contain limitations periods was in some respects undesirable, because it created uncertainty, bred litigation, and resulted in variations in the law governing federal rights and duties. H.R. Rep. No. 101-734, at 24 (1990). But, Congress

nonetheless explicitly refused to enact a more expansive provision that would have applied the four-year catch-all period to any "previously enacted legislation lacking a limitations period." *Id.*

Instead, faced with strenuous opposition to the recommended law from groups that supported existing borrowed statutes of limitations for claims arising under existing federal statutes, Congress compromised and enacted a law that authorized application of a federal catch-all period only in civil actions arising under laws enacted *after* December 1, 1990. As the House Report explained:

> Witnesses testifying on behalf of the Department of Justice and the Judicial Conference, urged that this section be made retrospective, so as to provide a fallback statute of limitations for previously enacted legislation lacking a limitations period. As witness George Freeman noted at the hearing, however, with respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to a six month limitations period in one statute, and a ten year period in another, would threaten to disrupt the settled expectations of a great many parties. Given that settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively without further study to ensure that the benefits of retroactive application would indeed outweigh the costs. [*Id.*]

At the time Congress enacted the federal catch-all limitations period, the federal limitations period for § 1981 actions was established for numerous forum states. See 6 Lex

K. Larsen, *Employment Discrimination* § 104.06[1], at 104-21 to 104-22 nn.12, 16 (2d ed. 2003) (citing cases).

3. The next year, in 1991, Congress amended § 1981 in response to *Patterson*. The Civil Rights Act of 1991 maintained the existing statutory language as subsection (a), and then added a subsection (b), defining the phrase "make and enforce contracts" as follows:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. [Civil Rights Act of 1991, Pub. L. No. 102-166, § 101(b), 105 Stat. 1071, 1072 (codified at 42 U.S.C. § 1981(b)).]

Although the 1991 Act amended the civil rights laws, including § 1981, in numerous ways, see *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 305 n.5 (1994) ("[s]eldom if ever has Congress responded to so many decisions [of the Supreme Court] in a single piece of legislation as it did in the Civil Rights Act of 1991") (citing *Landgraf* v. *USI Film Products*, 511 U.S. 244, 250-51 (1994)), Congress did not alter the established limitations rule governing § 1981 actions. Indeed, the only legislative history related to the statute of limitations in the 1991 Act is a Committee Report reflecting an assumption that the rule established in *Goodman* would continue to apply. See H.R. Rep. No. 102-40, pt. 1, at 63 (1991) ("under 42 U.S.C. section 1981, . . . victims have a longer period of time to commence suits [than do Title VII plaintiffs]. In the absence of an express limitations period . . . , courts applying the statute have looked to analogous state statutes of limitations. These statutes typically allow two or three years, and allow up to six years in some states").

4.a. Petitioners are African-American former employees of Donnelley's Chicago manufacturing division and certain

other divisions. On January 26, 1993, Donnelley was informed by Sears, Roebuck and Company that Sears would no longer publish, and hence Donnelley would no longer print, the so-called "Big Book" catalogue. Two days later, Donnelley decided to close its Chicago manufacturing division. Donnelley terminated all of the division's temporary employees who worked exclusively on Sears' production; most full-time employees were also terminated or transferred under a job posting system by March 31, 1993. The shutdown was complete by July 31, 1994, when the remaining skeleton crew was terminated.

No complaint related to the 1993 shutdown decision was asserted until November 25, 1996, when petitioners filed a class action, claiming, *inter alia*, violations of "the Civil Rights Act of 1871, as amended, and as amended by the 1991 Civil Rights Act." J.A. 9-10. Specifically, petitioners alleged discriminatory termination and refusal to transfer related to the closing of the Chicago division, as well as discriminatory assignment to temporary jobs and the maintenance of a racially hostile work environment. *Id.* at 9-20. In this action, the district court certified three classes: Class 1, alleging discriminatory termination and denial of transfers in the Chicago division shutdown, Class 2, alleging discriminatory assignment to temporary jobs and denial of promotion to regular, full-time jobs, and Class 3, alleging racial harassment at the Chicago division and two others.

Donnelley sought partial summary judgment with respect to Class 1 and Class 2 and all members of Class 3 who were employed at the Chicago division, asserting that the § 1981 claims were governed by Illinois' two-year statute of limitations for personal injury actions and were therefore time-barred. Petitioners argued that their claims were governed instead by the four-year period in § 1658.

The district court denied the motion for partial summary judgment. With respect to Classes 1 and 3, the court held that Congress intended § 1658 to apply to § 1981 claims alleging

discrimination in the "mak[ing] and enforc[ing]" of contracts, albeit only to the extent that the phrase was expanded in the Civil Rights Act of 1991. Pet. App. 28a-40a. It held that "whenever Congress, after December [1,] 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of action." *Id.* at 37a. Thus, it concluded that "[c]laims that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b) . . . clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658." *Id.* at 37a-38a. The court concluded that the Class 1 and 3 petitioners' claims arise under § 1981(b) and therefore that they are governed by § 1658. *Id.* at 40a.

The district court refused to decide on summary judgment that § 1658 applies to the Class 2 assignment and promotion discrimination claims pending further development of the facts and the briefing of the question whether those claims would have been actionable even under *Patterson* and prior to the 1991 Act. See Pet. App. 40a ("[t]he claims asserted by Class 2, however, are not as easily drawn, and the parties are directed to sort out this question amongst themselves in light of the Court's ruling"). The district court certified its decision with respect to Classes 1 and 3 for interlocutory appeal to the Seventh Circuit. See 28 U.S.C. § 1292(b); Pet. App. 12a.

b. The court of appeals reversed. It concluded that petitioners had filed a civil action "arising under" § 1981(a). The court reasoned that § 1981(b) simply "makes clear that 'make and enforce' includes post-formation conduct" and that § 1981 actions, including those for discrimination in post-formation conduct, continue to arise under § 1981(a) in the sense Congress intended in § 1658. The court also pointed out that nothing in the 1991 Act indicates any congressional intent to alter the long-settled practice of borrowing state law limitations periods in § 1981 claims and, indeed, that the only

evidence of congressional intent is to the contrary. Pet. App. 25a.

Petitioners timely sought rehearing and rehearing *en banc*, but those petitions were denied. Pet. App. 1a-2a.

SUMMARY OF THE ARGUMENT

Petitioners' allegations of race discrimination in the "mak[ing] and enforc[ing]" of contracts state claims that originate in, or "aris[e] under," the language of § 1981, enacted and in force since 1866. These claims are governed by the forum state's statute of limitations for actions for personal injury under the limitations rule established in *Goodman*, 482 U.S. at 660-62.

In Part I, we show that § 1658 does not alter the limitations rule for claims under § 1981. That statute applies the four-year, catch-all period only to claims "arising under" statutes enacted after December 1, 1990. Petitioners' claims "aris[e] under" the operative language of a statute enacted more than a century ago, with a settled limitations rule established by this Court in 1987 – not under the amendment of the definition of the "make and enforce" element of a § 1981 claim. Moreover, in enacting § 1658, Congress intended to preserve settled limitations rules. It would therefore contravene the language and congressional intent underlying § 1658 to interpret that provision to abrogate established limitations rules for statutory regimes enacted prior to December 1, 1990 whenever such a statute is amended.

Petitioners and the government, however, contend that the phrase "arising under" has a single, settled meaning that must be applied to § 1658. They rely on the "federal ingredient" interpretation of "arising under" in 28 U.S.C. § 1331, that delineates the scope of the federal courts' subject-matter jurisdiction. Section 1658 does not address subject-matter jurisdiction and the phrase "arising under" is not used to ensure that federal courts have the power to decide questions

of federal law. Instead, the issue under § 1658 is the single appropriate limitations rule for a claim "arising under" a particular statutory regime. Moreover, the phrase "arising under" is inherently ambiguous, and this Court has routinely interpreted it in light of its statutory context and the purposes it was intended to serve. Here, the Court should follow its usual practice and interpret the phrase "arising under" to preserve established limitations rules for existing statutory regimes and to draw a bright line between claims governed by established limitations rules as of December 1, 1990, and entirely new claims codified in statutes enacted after December 1, 1990.

In Part II, we show that the interpretation of § 1658 proffered by petitioners and the government achieves neither of the statutory purposes and, indeed, undermines them. Most notably, application of the "federal ingredient" interpretation of the phrase "arising under" would displace limitations rules for claims that had merit even before December 1, 1990. This is because if a court wants to apply the "federal ingredient" standard as interpreted under § 1331, a claim would "aris[e] under" a post-December 1, 1990 statute whenever *any* element of the claim is based on a statutory provision amended after that date. This will be so even if that claim also would have been meritorious under the pre-amendment statute. This is precisely the result Congress intended to foreclose in § 1658; the "federal ingredient" interpretation of § 1658 is plainly wrong.

Nor can this interpretation be salvaged by saying, as petitioners and the government do, that a claim "aris[es] under" a post-December 1, 1990 statute when such a statute is an ingredient of the claim *and* when the claim previously would have lacked merit. This reading of "arising under" would mean that a new claim is created whenever a statute is amended to alter the scope of an existing cause of action – claims that rely on the alteration for their merit would be governed by § 1658, while claims that would have been

meritorious even absent the alteration would be governed by the established limitations rule. An amendment reducing the number of employees required to subject an employer to liability under a federal law from 25 to 15 for example, would mean that claims against employers with 25 employees would be governed by the established limitations rule and claims against employers with between 15 and 24 employees would be governed by § 1658.

This situation not only contravenes Congress's intent by eliminating the established limitations rule for claims "aris[ing] under" many venerable federal statutory regimes, it also leads to irrational, absurd, and counter-productive results. After a statute is amended in any way, claims "arising under" the same statutory subsection will be subject to two distinct limitations rules. So here, claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts will be subject to the *Goodman* rule and § 1658, depending upon the court's characterization of the underlying acts. The unfairness and confusion this unprecedented situation will generate cannot be overstated.

In addition, any time a statute is amended, the courts will have to decide whether the amendment creates "new" claims. That determination was relatively easy here, where Congress had expressly overruled a decision of this Court. But such clarity will rarely exist. A statute may be an attempt to clarify a law that has never been uniformly interpreted and to invigorate a law that has not been interpreted at all. An amendment may approve the interpretation adopted by one circuit and abrogate that adopted by another; in that circumstance, under petitioners' view, the correct interpretation of § 1658 would *require* the application of different limitations rules for precisely the same claim in different circuits. Moreover, even after a limitations period is assigned to "new" claims under an amended statute, additional litigation will be required, as was the case here. There will be disputes about whether the factual allegations

state an "old" or "new" claim because the limitations period will turn on that decision.

An ambiguous statute like § 1658 should not be interpreted to produce results that contravene congressional intent and the very purposes of limitations rules. It is particularly inappropriate to add this confusion and complexity to § 1981 litigation. Nothing in the Civil Rights Act of 1991 suggests any intent to overrule the Supreme Court's decision in *Goodman*, which is notable in light of the Act's express overruling of other of this Court's decisions. Moreover, it is critically important to have "'firmly defined, easily applied'" rules regarding limitations in the civil rights context. *Wilson* U.S. at 266.

For all these reasons, the interpretation of § 1658 urged on the Court by petitioners and the government should be rejected. The Court instead should hold that claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts "aris[e] under" the original language of § 1981, effective since 1866, and are governed by the *Goodman* rule. The expanded definition of the "make and enforce" element of such a claim does not alter the conclusion that petitioners' claims "aris[e] under" the original operative language within the meaning of § 1658.

ARGUMENT

I. THE PHRASE "ARISING UNDER" IN § 1658 IS AMBIGUOUS AND SHOULD BE INTERPRETED BASED ON ITS CONTEXT AND PURPOSES, NOT BY APPLYING CASE LAW DEVELOPED IN AN ENTIRELY DIFFERENT STATUTORY SETTING.

In *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987), this Court established the limitations rule for actions brought under the operative language of § 1981. Such actions are governed by the forum state's limitations period for personal injuries. Because petitioners' claims state a cause of

action under – *i.e.*, "aris[e] under" – § 1981, and because the time period for such claims in the forum state of Illinois is two years, petitioners' claims are time-barred.

Section 1658 does not alter the limitations rule for actions under § 1981. Section 1658 states in pertinent part that a "civil action arising under an Act of Congress enacted after [December 1, 1990] may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658. In common parlance, "'arising under'" means to "'spring up'" or to "'originate,'" as the government notes. Govt. Br. 10-11 (quoting *American Heritage Dictionary* 99 (3d ed. 1992), and *Oxford English Dictionary* 445 (1933)); see also *Black's Law Dictionary* 102 (7th ed. 1999) (defining "aris[ing]" as "stem[ming] (from)"). Because a civil action springs up or originates from the statute codifying the elements of the claim, petitioners' claims spring up from, or originate in, § 1981(a), not § 1981(b) which simply defines the "make and enforce" element of the cause of action created by § 1981. One would *not* ordinarily say that a claim "aris[es] under" or originates in a subsection of a statute that provides only a definition of an element of a legal claim.[2] On this reading, petitioners' claims plainly are not governed by § 1658's limitations period.

Moreover, in § 1658, Congress clearly intended to preserve the limitations rules governing existing statutory regimes, and to provide clear and definitive limitations rules for newly-created statutory regimes. See *supra* at 4-5. Existing limitations rules are *not* preserved if those rules cease to apply whenever an existing statutory regime is amended in any way, however minor; and confusion, not clarity, is the result if

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[2] For example, one would ordinarily identify a federal securities fraud claim as "arising under" the substantive provisions in 15 U.S.C. § 78j, and not under the definition of "security," *see id.* § 78c(a)(11). Similarly, one would say that an age discrimination suit arises under the prohibition against age discrimination, *see* 29 U.S.C. § 623, and not the definition of "employer," *see id.* § 630(b).

some claims arising under a statutory subsection have one limitations period, while other claims arising under the same subsection are governed by a different period.

To fulfill Congress's intent, accordingly, the Court should hold that a claim "aris[es] under" a statute enacted prior to December 1, 1990, when such a statute codifies the claim and has a settled limitations rule, and that a claim "aris[es] under" a statute enacted after December 1, 1990 only when such a statute enacts an entirely new claim that is not subject to an existing limitations rule. This test both preserves limitations rules for statutory regimes in place on December 1, 1990, and provides a clear, easily administrable rule. As demonstrated *infra* at 22-31, the alternative interpretations of § 1658 offered by petitioners and the government have consequences that directly conflict with congressional intent and are irrational – increasing uncertainty, litigation, and unfairness.

Petitioners and the government, however, argue that as a legal term of art, the phrase "arising under" has a single plain meaning that should be applied here. They point to the generally applicable interpretation of the phrase "arising under" that has evolved under 28 U.S.C. § 1331, to determine when a federal court has subject-matter jurisdiction over a claim. In that setting, a case "arise[s] under" a federal law "whenever federal law 'forms an ingredient of the original cause,'" Govt. Br. 11 (quoting *Osborn*, 22 U.S. (9 Wheat.) at 823), or is a "'necessary element of a [a claim],'" *id.* at 12 (alteration in original) (quoting *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988)). In the § 1331 sense, a provision of the Civil Rights Act of 1991 is an ingredient or element of petitioners' claim, and thus petitioners and their *amici* assert that § 1658 unambiguously applies.[3]

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[3] Petitioners and their *amici* support an asserted plain language reading of "arising under," but not of § 1658 as a whole. The "plain language" of § 1658 simply says that an action arising under a post-December 1, 1990 act "may not be commenced *later* than 4 years after the cause of action accrues." 28 U.S.C. § 1658 (emphasis supplied). It does not by its terms preclude the continuing application of shorter limitations periods, such as those applied under the *Goodman* rule.

This settled-meaning argument is wrong for two reasons:

First, in § 1658, the phrase "arising under" does not address federal subject-matter jurisdiction, but instead a wholly different question (the appropriate limitations period); the contexts and purposes of these provisions differ so dramatically that the interpretation developed in one cannot blithely be transferred to the other simply because both reside in Title 28 of the United States Code. The Court instead should follow its usual practice of interpreting an inherently ambiguous phrase in light of the statute's context and purposes.

In § 1658, the phrase "arising under" is used in a setting and for purposes wholly distinct from those underlying § 1331. Section 1331 uses the phrase "arising under" to delineate the broad scope of the federal courts' subject-matter jurisdiction. Section 1331 inclusively defines the broad area in which federal courts have power in order to preserve the supremacy and consistency of federal law. Under § 1331, a single claim or cause of action may "aris[e] under" more than one federal law; and federal and state courts generally have overlapping jurisdiction over any claim that "aris[es] under" both federal and state law.

In sharp contrast, § 1658 is not a statute delineating a federal court's subject-matter jurisdiction. It is instead intended to create a test that determines the single limitations rule applicable to a particular legal claim. And, although a legal claim may "aris[e] under" numerous federal laws for the purpose of determining whether federal courts have subject-matter jurisdiction under § 1331, a claim "aris[es] under" only one statute for the purpose of determining its statute of limitations.

Case law interpreting § 1331 should not be imported blindly into the distinct context of § 1658, where Congress was engaged in the substantively different enterprise of assigning a single limitations rule to a claim.[4] Indeed, as we show *infra* at 22-23, in light of § 1658's different context and purposes, even petitioners and the government urge the Court to adopt not the "federal ingredient test," but a more stringent test – again demonstrating the ambiguity of the phrase "arising under."[5]

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[4] For similar reasons, petitioners' and the government's reliance on *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298 (1994), is wholly misplaced. In *Rivers*, the Court addressed the question whether the expansion in the meaning of "make and enforce contracts" should be applied retroactively. The test for retroactive application of a statutory provision is whether the provision imposes new legal liabilities on past conduct, and the Court concluded that the expanded scope of § 1981 created new liabilities and thus should not be applied retroactively. *Id.* at 304. But, Congress did not incorporate the test for retroactivity into § 1658; indeed, § 1658 makes no reference to the date that a claim accrues – the crucial date for purposes of assessing retroactivity. Instead, in § 1658, Congress focused on the date that a statute is enacted, and limited the application of the federal catch-all period to claims "arising under" statutory regimes enacted after December 1, 1990 statutes. Congress sought to protect *not* the settled expectations of persons who had engaged in past acts, but instead the "settled expectations" of persons litigating under statutes whose "relevant limitations period has long since been resolved by judicial decision." H.R. Rep. No. 101-734, at 24. The fact that the expanded definition of "make and enforce contracts" is not retroactive thus does not decide the question whether a claim based on that expanded definition "aris[es] under" a statute enacted before or after December 1, 1990, within the meaning of § 1658.

[5] Further evidence of the ambiguity of the phrase "arising under" in § 1658 is the multiplicity of interpretations adopted by the courts of appeals and the federal district courts. The majority of the courts of appeals to address the question have rejected the interpretation of petitioners and their *amici*, recognizing the ambiguity of the phrase and refusing to adopt a reading that would generate confusion and substantial litigation not only under § 1981, but under numerous statutes whose limitations rules were thought to be settled. *See* Pet. App. 26a–27a; *Zubi*

Second, and equally to the point, while "arising under" may have a generally applicable meaning in determining federal subject-matter jurisdiction, it does not have a single meaning even in that context and certainly has no plain, settled, or generally applicable meaning in other, unrelated settings. This Court routinely examines statutory context and purposes to interpret the ambiguous phrase "arising under."

For example, the Medicare and Social Security Acts instruct that "[n]o action against the United States, . . . shall be brought under section 1331 or 1346 of title 28 to recover on any claim *arising under* this subchapter." 42 U.S.C. § 405(h) (emphasis supplied). In this context, the Court has held that claims "aris[e] under" the Acts, and must be administratively exhausted, when they are "inextricably intertwined" with a benefits claim. See *Heckler* v. *Ringer*, 466 U.S. 602, 614 (1984); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975).[6] The Court does not apply the "federal ingredient" test in this context, because it would not serve the purpose of distinguishing claims that must be administratively exhausted from claims that need not be exhausted.

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v. *AT&T Corp.*, 219 F.3d 220, 222 (3d Cir. 2000); *Madison* v. *IBP, Inc.*, 257 F.3d 780, 798 (8th Cir. 2001), *vacated*, 536 U.S. 919 (2002); *but see Harris* v. *Allstate Ins. Co.*, 300 F.3d 1183, 1188 (10th Cir. 2002). The majority of district courts – the courts that best comprehend and will bear the burdens of the litigation created by petitioners' and the government's interpretation – have also concluded that § 1658 is ambiguous and rejected petitioners' view as both contrary to the statutory purposes and unworkable. See B. Byers, *Adventures in Topsy-Turvy Land: Are Civil Rights Claims Arising Under 42 U.S.C. § 1981 Governed by the Federal Four-Year "Catch-All" Statute of Limitations, 28 U.S.C. § 1658?*, 38 Washburn L.J. 509, 528-34 (1999) (citing numerous cases); *Harris*, 300 F.3d at 1188 (citing numerous cases).

[6] Thus, although a claim "arising under" the Medicare or Social Security Act may also "aris[e] under" the Constitution or state law as that phrase is generally used in § 1331, *see Salfi*, 422 U.S. at 760-61, the consequence of a determination that a claim "aris[es] under" the Medicare or Social Security Acts is that federal and state courts are *deprived of* jurisdiction except as authorized by those Acts.

Even under § 1331, the "federal ingredient" interpretation does not always hold sway. In *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson*, this Court held that "the presence of a federal issue in a state cause of action" does not make the action one "arising under" federal law for § 1331 purposes, when Congress intended "no federal private cause of action" for a violation of the federal law at issue. 478 U.S. 804, 811-12 (1986).[7] Similarly, under the "complete preemption" doctrine, the Court has developed different tests to determine when a claim "aris[es] under" federal law, because that determination entirely displaces *all* state law claims.[8]

The critical point is that the meaning of the phrase "arising under" and the consequences of a determination that a particular claim "aris[es] under" a particular federal law vary with their context. Far from having a plain meaning with established consequences, the phrase is ambiguous and its interpretation depends upon its context and the purpose for which it is employed. In § 1658, the phrase "arising under" is employed to determine the unique limitations rule governing a particular claim, to preserve limitations rules in place on December 1, 1990, and to provide a clear rule for the future; it should be interpreted to achieve those purposes.

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[7] The government attempts to distinguish *Merrell Dow* by saying that there is a federal private right of action to enforce § 1981, Govt. Br. 12 n.3, but misses the crucial relevance of the decision and the complete preemption cases: A determination that a claim contains a "federal ingredient" does not uniformly result in a determination that the claim "aris[es] under" that federal law even under § 1331.

[8] For example, a claim "aris[es] under" § 301 of the LMRA only if the claim is "substantially dependent on analysis of a collective-bargaining agreement," *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 394 (1987) (quotations omitted), not whenever § 301 is an ingredient of a claim. A claim "aris[es] under" § 502(a) of ERISA only if it is a claim to enforce benefit rights derived from a covered plan, *Metropolitan Life Insurance Co.* v. *Taylor*, 481 U.S. 58, 65 (1987), not whenever a plan benefit is an ingredient of a claim.

II. THE INTERPRETATIONS OF § 1658 OFFERED BY PETITIONERS AND THE GOVERNMENT ARE CLEARLY WRONG; RESPONDENT OFFERS THE ONLY REASONABLE INTERPRETATION THAT COMPORTS WITH THE STATUTE'S LANGUAGE AND PURPOSES.

A. The Phrase "Arising Under" In § 1658 Clearly Cannot Be Interpreted As In § 1331.

As set forth above, the phrase "arising under" in § 1658 is best read as the Court of Appeals read it – to provide that petitioners' claims "aris[e] under" the original "make and enforce" language of § 1981, not under the elaboration of that language in § 1981(b) – and is, at the very least, ambiguous. What is as fundamentally important, moreover, is that the application of the interpretation of "arising under" developed under § 1331 would contravene the language and purposes of § 1658.

Application of the "federal ingredient" interpretation of the phrase "arising under" in § 1658 would displace limitations rules for legal claims that, on both parties' view, pre-date December 1, 1990 – an outcome Congress clearly rejected. On the "federal ingredient" view of "arising under," a civil action "aris[es] under" a statute enacted after December 1, 1990, whenever *any* element of the claim is based on an Act amended after December 1, 1990, whether or not that claim would have been meritorious prior to the amendment. That is because the amended statute constitutes, at least in part, the legal basis of the claim.

An example clearly illustrates this point. Assume that a federal statute defines an employer as a person employing 25 or more employees; and assume further that after December 1, 1990, Congress amends the Act to define an employer as a person employing 15 or more employees. An employee employed by an employer with 25 employees files a civil action against the employer after December 1, 1990. That

action plainly "aris[es] under" the amended Act in the "federal ingredient" sense, because an element or ingredient of the claim is employment by a person with 15 or more employees (*i.e.*, the amended provision). Clearly, it is the amended Act that provides the legal basis for this element of the claim; no plaintiff would allege that this element of his or her claim is based on the pre-amendment law, in part because that provision no longer exists. See also *Zubi* v. *AT&T Corp.*, 219 F.3d 220, 226 n.7 (3d Cir. 2000) (under the "federal ingredient" interpretation, "the four-year limitations period [would] apply[] to any civil lawsuit containing a claim based on a statute that has been amended in any way after December 1, 199[0]").

Accordingly, under the "federal ingredient" interpretation of "arising under," all claims that contain any element based on a statute amended after December 1, 1990 would "aris[e] under" the amended Act whether or not those claims were meritorious before the amendment. This was an alternative clearly available to Congress and, indeed, urged on Congress, but ultimately rejected. See *supra* at 4-5. Thus, the result advocated by petitioners and the government would directly contravene Congress's decision to preserve existing limitations rules – a decision reflected in both the language of the statute and the legislative history:

> [W]ith respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision . . . . [and] retroactively imposing a four year statute of limitations . . . would threaten to disrupt the settled expectations of a great many parties. *Given that settling expectations . . . is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively . . . .*" [H.R. Rep. No. 101-734, at 24 (emphasis supplied).]

Based on a similar analysis, the Government is wrong when it asserts that under the "federal ingredient" interpretation of

"arising under," a civil action would not "aris[e] under" an amended statute if Congress simply changed the burden of proof. See Govt. Br. 19-20. If federal law provides the level of proof that is required as a matter of law to prove an element of a claim, then the civil action depends upon that federal law, and federal law is a necessary ingredient in adjudication of the claim. Put differently, in the "federal ingredient" sense, a claim "aris[es] under" any federal law when "the right to relief depends upon the construction or application of the Constitution or laws of the United States." *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921). Accordingly, a serious and critical defect in petitioners' and the government's assertion that "arising under" has the same meaning in § 1658 as it does in § 1331 is that § 1658 would apply almost every time Congress amends a statute containing a private cause of action – a result directly contrary to what all parties acknowledge was Congress's intent.

This reality, by itself, illustrates not only that the phrase "arising under" in § 1658 is ambiguous, but also that it cannot be interpreted as in § 1331, and that its meaning should be determined by its statutory context and purposes.[9] See also *Zubi*, 219 F.3d at 223 n.5 ("[s]ection 1658 seeks to distinguish between cases arising under certain Acts of

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[9] There is an additional reason that petitioners' and their *amici*'s "federal ingredient" interpretation of "arising under" does not apply under § 1658. On this interpretation, the four-year catch-all period would govern state law claims without express limitations periods when an element or ingredient of such a claim is based on a federal statute enacted after December 1, 1990. As the government points out, on the interpretation of "arising under" developed under § 1331, "'a case may arise under federal law "where the vindication of a right under state law necessarily turn[s] on some construction of federal law."'" Govt. Br. 12 (quoting *Merrell Dow*, 478 U.S. at 808). A rote application of the "federal ingredient" interpretation of "arising under" would, accordingly, subject state-law claims not governed by express limitations periods to the federal catch-all limitations period – a result plainly not intended by Congress.

Congress from cases arising under other Acts of Congress *for the purpose of preserving existing statute of limitations case law*") (emphasis supplied).

B. Petitioners' And The Government's Attempt To Interpret § 1658 To Preserve The Limitations Rules For Some, But Not All Claims Under Statutes Enacted Prior To December 1, 1990 Undermines The Statute's Purposes And Has Irrational, Indeed Absurd, Results.

The petitioners' and government's briefs implicitly acknowledge that the "federal ingredient" interpretation is wrong, because they ultimately propose a different interpretation. They suggest that a claim "aris[es] under" a statute enacted after December 1, 1990, only if that statute is an ingredient of the claim *and* the claim is "new" in the sense that it became meritorious as a result of the statute – *i.e.*, the "federal ingredient" plus "new" claim interpretation. See Govt. Br. 20 (explaining that the post-December 1, 1990 statute must "create liabilities that had no legal existence before the Act was passed") (internal quotation and alteration omitted). As noted, this contention disproves the assertion that the phrase "arising under" has is a legal term of art with a single, established meaning. Equally to the point, this interpretation, too, is wrong.

Like the "federal ingredient" test itself, the "federal ingredient" plus "newness" test fails on its merits. Preliminarily, it is worth noting that the "newness" part of this test is wholly untethered from the meaning of "arising under" in § 1331. A claim "aris[es] under" a federal law under § 1331 when it is based on that law, without regard to whether the claim is ultimately deemed to have legal merit. See *Steel Co.* v. *Citizens For A Better Env't*, 523 U.S. 83, 89 (1998) (a case "aris[es] under" federal law "'if the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another'").

A claim asserting race discrimination in the "mak[ing] and enforc[ing]" of a contract has always "aris[en] under" § 1981 within the meaning of § 1331, despite the varied "construction[s]" given the phrase "make and enforce" by the courts and Congress.

Moreover, although neither petitioners nor the government make any effort to define the "federal ingredient" plus "newness" test, they seem to suggest that a claim is "new" whenever it "aris[es] under" a statutory regime that did not protect the right being asserted prior to December 1, 1990. This interpretation requires a court to conclude that a "new" claim is created whenever a statute is amended in any way that expands or contracts the scope of an existing cause of action. For example, if the definition of employer is amended to reduce the required number of employees from 25 to 15, claims against employers with 25 employees will be governed by the old limitations rule, while claims against employers with between 15 and 24 employees will be governed by § 1658.

This approach to newness is contrary to § 1658's purposes. Congress made clear in § 1658 its intent to preserve the existing limitations rules governing statutory regimes. This specific intent is directly contravened if § 1658 is interpreted to command that an existing limitations rule is discarded for each and every claim under an existing statutory regime that depends upon any amendment to the claim, however minor.

For this reason alone, the question whether a civil action arises under a post-December 1, 1990 statute should not turn on whether the claim has legal merit as a result of the statute. But, this reason does not stand alone. If the "federal ingredient" plus "newness" test is adopted, § 1658 will produce results that are irrational and, indeed, absurd, in light of the purposes of limitations law generally and § 1658 particularly. It is a well-established principle of statutory interpretation that, unless compelled by a statute's unambiguous language, interpretations that produce such

absurd, irrational, or counter-productive results are strongly disfavored. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 70-71 (1994); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (citing *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978)). Since § 1658 can readily be interpreted to avoid these consequences, there is no reason to interpret the statute to produce such results.

The government seeks to disparage these arguments by characterizing them as "policy concerns." Govt. Br. 27. Petitioners' interpretation of § 1658 *is* bad policy because it would increase litigation and create uncertainty, but the argument that a statutory interpretation is wrong because it would have consequences utterly antithetical to Congress's known intent and, indeed, irrational in light of the statutory purpose and the realities of litigation may not be waved aside as a "policy concern[]." Given the ambiguity in the statute, these are precisely the kinds of concerns that should inform the Court's judgment as to how to interpret § 1658.

1. First, on petitioners' and the government's theory, claims "arising under" the same statutory subsection – § 1981(a) – would be subject to two distinct statutes of limitations. Claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts that are meritorious under *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 177-78 (1989), would be governed by the limitations rule established in *Goodman*, while claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts that are meritorious as a result of the Civil Rights Act of 1991 would be subject to § 1658. Using the example *supra* at 19-20, when Congress amends the definition of "employer" to decrease the required number of employees to 15, an employer with 25 employees will be subject to the "old" limitations rule, while an employer with 15 employees will be subject to § 1658's four-year period.

This result is not only irrational and unfair, it will also generate substantial confusion for unsuspecting plaintiffs and

unpleasant surprises for defendants that miscalculate their potential liability. See *Wilson*, 471 U.S. at 275 n.34 ("[p]laintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose").

Neither petitioners nor the government do business with this substantial problem and absurdity. Indeed, the government's entire response is that courts routinely apply different limitations periods to different claims in a single lawsuit, and that Title VII, for example, has a different limitations period than does § 1981. Govt. Br. 27. This is, at best, obfuscation. All lawyers are aware that claims "arising under" different statutes have individually determined limitations periods; most lawyers should be aware that claims "arising under" different provisions of a single statute might have different limitations periods, and that they should surely check. But, no lawyer will presume that claims arising under the same subsection of a single statute – indeed, claims that identically allege discrimination in the making and enforcing of a contract – will be governed by different limitations rules.

The government's attempt to slide by this obviously absurd and confusing consequence of the statutory interpretation it urges is understandable. Neither the government nor the petitioners were able to present any example in which Congress ever before created two limitations rules for the same language in the same subsection of the same statute. And, Congress did not mean to do so here. At a minimum, the Court should insist on much clearer language than appears in § 1658 before accepting such an outcome. In fact, Congress did not intend in § 1658 to split statutory subsections into fragments governed by different limitations rules simply because the claim embodied in that subsection is amended in some way after December 1, 1990. See, *e.g.*, *Zubi*, 219 F.3d at 224 (stating that "[a]doption of [this]

interpretation would seem to us to generate exactly the kind of confusion and unfairness that Congress sought to avoid"); *Davis* v. *California Dep't of Corr.*, No. Civ. S-93-1307, 1996 U.S. Dist. LEXIS 21305 (E.D. Cal. Feb. 23, 1996) (characterizing this approach as "confusing" and "unfair"); B. Byers, *supra* at 528-34 (describing judicial rejections of this outcome).

2. Second, on petitioners' interpretation ("arising under" plus legal merit resulting from a post-December 1, 1990 statute), courts will have to decide whether a claim "arising under" an amended statute is, in fact, a "new" claim – a claim whose legal merit is based on a post-December 1, 1990 Act of Congress. In this case, the nature of the "new" claim is clear. It is recognized that liability under § 1981 was expanded, because this Court had spoken on the scope of § 1981 and Congress reversed the Court's interpretation in the Civil Rights Act of 1991.

In many cases, however, that clarity will be lacking. Where there has been a circuit split and Congress simply clarifies a statute that has either been the subject of conflicting judicial interpretations, or where a statute has not been definitively interpreted, it will be virtually impossible for courts to decide whether Congress created a new claim and hence, whether the federal catch-all applies. As a result, different circuits would properly reach different conclusions about the appropriate statute of limitations, based on their differing past interpretations of the law in question (or their lack of any such interpretation, or their view of the majority rule) prior to the amendment. Those circuits whose pre-amendment interpretations of the law were consistent with the amendment would conclude that the amendment did not create a new claim, and thus did not trigger § 1658. By contrast, those circuits whose pre-amendment interpretations were abrogated by the amendment would conclude that the amendment *did* create new law, and thus did trigger § 1658. Thus, any time Congress amends a statute to clarify a law and eliminate a

circuit split, different circuits will end up with different limitations rules. Had the Court not granted certiorari in *Patterson*, for example, this would have been the outcome here.

As the court of appeals stated in *Zubi*, 219 F.3d at 224, "the line between an amendment that modifies an existing right and one that creates a new right is often difficult to draw." This is because

> [a]mendments frequently are intended to clarify the law when there has been a difference of opinion regarding the interpretation of an existing statute. In such situations, conflicting views on whether the clarifying amendment created new rights or merely codified the preexisting caselaw are what occasion the amendment. [*Id.*]

In *Zubi*, the court of appeals used other provisions of the Civil Rights Act of 1991 to demonstrate the uncertainty and litigation that would inevitably follow petitioners' proposed interpretation of § 1658. For example, Congress:

> adopted an amendment to the Civil Rights Act of 1964 "clarifying" that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." Adoption of [petitioners'] interpretation of § 1658 would surely lead to litigation over whether a plaintiff alleging that race was a motivating factor in his discharge asserts a newly-created claim or an old one . . . . [*Id.* (citation omitted).]

The court made analogous points with respect to amendments easing a civil rights plaintiffs' burden of proof, modifying a civil rights defendant's affirmative defenses, and adding rights to compensatory and punitive damages. *Id.* at 224-25.

If § 1658 is interpreted in the manner advocated by petitioners and the government, then *every time Congress amends a law containing a private cause of action, there will be litigation about whether the amendment creates a new claim because it will determine the limitations period for a subset of civil actions arising under the statute as amended.* This is more than ample reason not to interpret § 1658 in this way. See *Wilson*, 471 U.S. at 272, 275.

3. Third, even after the litigation over an amended statute is resolved and a limitations period is assigned to claims based on the pre-amendment statute and claims based on the post-amendment statute, there will be additional litigation. There will be disputes about whether the allegations in the complaint are based on the pre- or post-amendment statute. We can consider this problem with specific reference to § 1981. On petitioners' interpretation, litigants and courts must determine whether § 1981 claims are addressed to pre-contract-formation discrimination (a meritorious legal claim prior to December 1, 1990) or post-contract-formation discrimination (a meritorious legal claim only after December 1, 1990) in order to decide the limitations period.

Similarly intractable questions about whether a claim "aris[es] under" a pre-amendment or a post-amendment statute will result from statutory amendments addressing not just the elements of the claim, but also the burden of proof, the showing needed to overcome an affirmative defense, or the available remedies. In each case, the courts will have to decide whether the allegations of the complaint state a claim solely because of the amended provisions of the statute or whether those allegations would have stated a claim for relief under the pre-amendment version of the statute. The government hedges its bet on this point by saying that "the plaintiff's right to maintain the action would not *necessarily* depend on the new burden or procedure specified by Congress," Govt. Br. 20, but this is essentially an

acknowledgement that the plaintiff's right would depend upon the amended provisions in some circumstances and therefore that the courts would always have to decide.

The government's belittling of this problem in this specific context, see *id.* 27 ("in the typical case, there is not likely to be confusion as to whether a Section 1981 claim arises under the 1991 Act"), is difficult to understand, as it is exemplified in both this case and in another of the court of appeals' decisions addressing the issue presented. Here, after accepting petitioners' interpretation of § 1658, the district court expressly refused to decide on summary judgment whether § 1658 applies to the Class 2 assignment and promotion discrimination claims presented in this case. Instead, the court stated that it would reserve the question of what limitations period applies to those claims pending further development of the facts and the briefing of the question whether those claims would have been actionable even under *Patterson* and prior to the 1991 Act. See Pet. App. 40a.

Similarly, in *Harris* v. *Allstate Insurance Co.*, 300 F.3d 1183, 1192-93 (10th Cir. 2002), the district court held that the defendants' alleged discrimination with respect to referrals to the plaintiffs' business stated a claim under § 1981, even prior to its amendment by the Civil Rights Act of 1991. The court of appeals reversed. It held that some of the plaintiffs' claims arose under pre-amendment § 1981, while others arose under post-amendment § 1981. *Id.* at 1193 & n.1. As these examples reveal, *Patterson* drew a line that is "bright" (Govt. Br. 27-28) at the extremes; but in the broad middle of the spectrum there is ample room and incentive for litigation about the nature of a claim, particularly under petitioners' interpretation of § 1658, because the characterization of the action will determine the limitations period.

Equally to the point, petitioners and the government offer no response to the fact that their proposed interpretation of § 1658 would apply not only to § 1981, but also to all other

statutory regimes without express limitations rules amended after December 1, 1990. In each case in which the limitations period is at issue, litigants will have a strong incentive to characterize the allegations as arising under the pre- or post-amendment statute, and the result will be additional litigation. See *Wilson*, 471 U.S. at 272 ("[t]he experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983").

4. Petitioners' and their *amici*'s interpretation offers one last opportunity for confusion. If claims based on the expanded definition of "make and enforce" in the 1991 Act "aris[e] under" that Act for purposes of § 1658, courts may need to make an exception to this interpretation of "arising under" for state defendants: States may not be subject to § 1658, because Congress failed to make an "unmistakably clear" statement in that statute of its intent to reach them. *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 543-44 (2002); *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 786 (1991).

In *Raygor*, the State had waived its immunity from suit in state court subject to a particular statute of limitations. This Court held that the federal statute that tolled that statute of limitations during the pendency of a related federal action was of doubtful constitutionality, because it altered the terms of the State's consent to suit in its own courts. As a consequence, the Court interpreted the federal statute not to reach, *i.e.*, not to toll the limitations period in, actions against states where the state had not consented to such tolling.

Analogously, under Section 5 of the 14th Amendment, Congress has waived states' immunity to suit under § 1981. Section 1658, however, was not enacted pursuant to Section 5. Congress has not clearly stated any intent to broaden the scope of § 1981's infringement on state sovereignty by

applying § 1658 to § 1981 claims against states – states that since 1985 have generally been subject to shorter limitations periods under this Court's longstanding interpretation of § 1988. See *Wilson*, 471 U.S. at 267-69. Applying the interpretive principle of constitutional doubt, courts should hold that a § 1981 claim based on the expanded "make and enforce" definition does *not* "aris[e] under" a statute enacted after December 1, 1990 pursuant to § 1658, when the defendant is a state.

If it were crystal clear that a claim based on the expanded "make and enforce" definition in the 1991 Act "aris[es] under" the 1991 Act, a confusing outcome would have to be endured – that is, a § 1981 claim would be governed by the *Goodman* limitations rule whenever it is meritorious under *Patterson*, and whenever a state is the defendant, but governed by § 1658 whenever the claim is meritorious under the expanded definition, unless the defendant is a state. But, as demonstrated above, the phrase "arising under" in § 1658 is ambiguous. There is no need, accordingly, to give the phrase "arising under" different definitions based on the nature of the defendant.

5. Finally, adding all of the above-described layers of complexity to § 1981 litigation is particularly unjustified. As noted *supra* at 6, neither the 1991 Act nor its legislative history alters the limitations rule for § 1981 actions established in *Goodman* or suggests that this Supreme Court decision had been overruled. The only statement related to limitations in the legislative history of the 1991 Act suggests a congressional assumption that *Goodman* would continue to govern. See H.R. Rep. No. 102-40, pt. 1, at 63 (describing the *Goodman* rule and contrasting it to the Title VII limitations rule).[10] Considering the substantial overhaul that

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[10] The government disparages the value of this legislative history, stating that it is not addressed to the provision of the 1991 Act overruling *Patterson*. Govt. Br. 25-26. But, for those to whom legislative history is

the civil rights laws received in 1991,[11] it is telling that the 1991 Act leaves existing limitations law in place.

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material, the Committee Report's assumptions about the settled state of limitations law under § 1981 are significant. Congress was aware that § 1981 and Title VII were complementary remedies for employment discrimination and was actively comparing the statutory regimes in amending the civil rights laws in 1991.

The government further argues that a Committee Report cannot override plain statutory language, *id.* at 26, but this criticism is far afield. There is no plain language in the 1991 Act altering or otherwise addressing the proper limitations period for § 1981 claims (or in § 1658 for that matter). The Committee Report is, accordingly, relevant to Congress's apparent intent not to alter the established limitations periods in the civil rights law it was otherwise extensively revising.

[11] In addition to amending § 1981, the 1991 Act made numerous other changes in the civil rights laws. Title VII of the Civil Rights Act of 1964 was amended to provide punitive and compensatory damages for intentional discrimination, Pub. L. No. 102-166, § 102, 105 Stat. at 1072; the Americans With Disabilities Act of 1990 ("ADA") was amended to provide punitive and compensatory damages for intentional discrimination on the basis of an individual's disability or handicapped status. *id.* § 102(a)(3), 105 Stat. at 1072; both Title VII and the ADA were amended to provide for jury trial where the complaining party seeks compensatory or punitive damages, *id.* § 102(c), 105 Stat. at 1073; Title VII was amended to require the employer to demonstrate that a practice challenged as having a disparate impact is job-related and consistent with "business necessity," *id.* § 105, 105 Stat. at 1074-75; Title VII was amended to provide that any reliance on a discriminatory factor is unlawful, *id.* § 107(a), 105 Stat. at 1075; both Title VII and the ADA were amended to clarify that American citizens working in foreign countries are covered by these laws, provided the employer is American-owned or controlled and that compliance does not violate foreign law, *id.* § 109, 105 Stat. at 1077-78; Title VII was amended to clarify that seniority systems are subject to challenge not only when adopted, but also when they first apply to or injury an individual, *id.* § 112, 105 Stat. at 1079; Title VII and the Attorneys' Fees Awards Act were amended to clarify that expert witness fees may be recovered as a form of attorneys' fees, *id.* § 113, 105 Stat. at 1079; the Age Discrimination in Employment Act was amended to adopt the "right to sue" procedures available under Title VII, *id.* § 115, 105 Stat. at 1079; many provisions of the Federal Civil Rights Laws were extended to employees of the House and Senate, as well as Presidential appointees, with varying procedural and remedial provisions, *id.* §§ 301-325, 105 Stat. at 1088-99; and previously-exempt employees were brought within the coverage of the laws, *id.* § 321, 105 Stat. at 1097-98.

The government's reliance on 42 U.S.C. § 1988(a) to bolster its argument for the application of § 1658 to the 1991 Act (Govt. Br. 24) is entirely inapt and simply begs the statutory interpretation question presented here. Section 1988 directs the courts to look to "the laws of the United States, *so far as such laws are suitable to carry [the Civil Rights Acts] into effect*." 42 U.S.C. § 1988(a) (emphasis supplied). If federal law does not govern, then courts look to state law. *Id.* But, plainly, the application of § 1658 would not be "suitable" if its very terms and purposes made § 1658 inapplicable here; § 1988(a) does not express a preference for the application of federal law that by its own terms is excluded. In part because this Court had already resolved the statute of limitations rule for § 1981 actions, see *Goodman*, 482 U.S. at 660-64, and for the other reasons explained in this brief, § 1658 cannot be "suitabl[y]"applied here.

If anything, § 1988(a), and its established interpretation of the limitations rule under § 1981, suggests that § 1658 does not apply here. Section 1988(a) has arguably been definitively interpreted by this Court to direct, as a matter of federal law, the use of state law to provide limitation periods under § 1981. See *Wilson*, 471 U.S. at 269-70 (the characterization of federal civil right claims for limitations purposes is a matter of federal law). Thus, § 1988(a), as interpreted by this Court, may "otherwise provide" a limitations period for § 1981 claims within the meaning of § 1658.

* * * *

All of the consequences of petitioners' and the government's interpretation of § 1658 contravene the purposes of § 1658. Instead of providing certainty and reducing litigation in connection with the collateral issue of

limitations, petitioners' and the government's interpretation of § 1658 creates hybrid limitations regimes that no rational Congress could have envisioned or intended and that no rational judiciary would willingly embrace, and breeds uncertainty and pointless, endless litigation.

It is, accordingly, ironic that petitioners and their *amici* urge the Court to adopt their interpretation in the interest of national uniformity. This Court has made clear that the need for national uniformity, though substantial, does not itself "'warrant the displacement of state statutes of limitations for civil rights actions.'" *Wilson*, 471 U.S. at 275 (quoting *Board of Regents* v. *Tomanio*, 446 U.S. 478, 489 (1980)). And, of course, the interpretation pressed by petitioners and their *amici* would not result in uniformity at all – there would be two limitations periods governing claims under a single statutory subsection, § 1981(a) (and any other federal statutory regimes amended post-December 1, 1990). In any event, Congress had the opportunity to impose uniformity at the expense of borrowed limitations periods when it enacted § 1658 and declined to do so.

C. Section 1658 Should Be Interpreted To Establish A Bright Line Rule And Preserve Existing Limitations Rules.

Once it is acknowledged – as it must be – that the phrase "arising under" is ambiguous and that neither the "federal ingredient" interpretation nor its "newness" gloss should be applied, the Court should interpret § 1658 to serve its statutory purposes and avoid the results described above. To do so, as demonstrated in this brief, this Court should interpret § 1658 to provide that petitioners' claims "aris[e] under" a statute enacted before December 1, 1990, to wit § 1981, because the operative language of that statute is the origin of the legal claims alleged, and because it has a settled limitations rule. Statutory amendments that expand or contract the scope of statutory terms employed in such codified claims, such as that found in § 1981(b), do not alter

this conclusion. This is because (a) civil actions that "aris[e] under" § 1981 and other statutory regimes that pre-date § 1658 have established limitations periods that Congress expressly sought to preserve, and (b) substantial uncertainty and endless litigation will result if any amendment creates a new claim. Thus, a claim "aris[es] under" a statute enacted *after* December 1, 1990, only if such a statute codifies a wholly new claim that does not have an existing limitations rule.

This interpretation of § 1658 best serves Congress's clear intent to preserve existing limitations rules, and to provide clear and definitive limitations rules for newly-created statutory regimes. As noted *supra* at 4-5, and as is set forth in the statutory language and in the relevant Committee Report, § 1658 bars any application of its limitations period to statutory regimes enacted prior to December 1, 1990, in order to preserve existing limitations rules and to provide clear and certain limitations rules for future statutory regimes. See also H.R. Rep. No. 101-734, at 24 ("[g]iven that settling the expectations of prospective parties is an essential purpose of statutes of limitation, the Committee was reluctant to apply this section retroactively").

Indeed, in interpreting statutory limitations rules, this Court has generally recognized that "[f]ew areas of law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Wilson*, 471 U.S. at 266 (internal quotations omitted); *id.* at 270 (recognizing the "federal interest" in "'firmly defined, easily applied rules'"). In applying statutory limitations provisions to civil rights laws, the Court has further held that "the legislative purpose to create an effective remedy for the enforcement of federal civil rights is obstructed by uncertainty in the applicable statute of limitations, for scarce resources must be dissipated by useless litigation on collateral matters." *Id.* at 275.

Donnelley's interpretation of § 1658 is the most reasonable reading of the statute that comports with its purposes and the

purposes of federal limitations law generally and that entails none of the counter-productive and absurd results of the alternative interpretations proffered by petitioners and the government. Here, petitioners' claims of race discrimination in the "mak[ing] and enforc[ing]" of contracts "aris[e] under" the original language of § 1981, effective since 1866, and subject to the settled limitations rule established by this Court in *Goodman*, 482 U.S. at 660. The alteration of the meaning of the "make and enforce" element of a § 1981 claim does not change the conclusion that the claim itself was codified in 1866 and 1870 and has an established limitations rule. Thus, petitioners' claims are not governed by § 1658's limitations period.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 02-1205

In the Supreme Court of the United States

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED,
Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY,
A DELAWARE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

I. DEFENDANT ABSURDLY CONCLUDES THAT THE PLAINTIFFS' CAUSE OF ACTION AROSE UNDER THE VERY STATUTE THAT THIS COURT HELD IN *PATTERSON* DOES *NOT* GIVE RISE TO THAT ACTION

In its brief on the merits in this Court, Defendant abandons both its earlier position and the Seventh Circuit's holding below, that Plaintiffs' claims "'arise under' the original section 1981 *as well as the 1991 Civil Rights Act,*" [1] and *now* takes the astonishing position that Plaintiffs' claims arise *only* under the original Section 1981 enacted in 1866. According to Defendant, Plaintiffs' claims "arise under the operative language of a statute enacted more than a century ago, with a settled limitations rule established by this Court in 1987- [2] not under the amendment of the definition of the

[1] Appellant's Reply Brief at 5, *Jones v. R.R. Donnelley*, 305 F.3d 717 (7th Cir. 2002). (1/4/02) (emphasis added). See also the Seventh Circuit's holding at J.A. 92, that the language of Section 1658(a) does not address a cause of action that falls under two acts "one enacted before and one enacted after the effective date of §1658." To the extent that this Court reaches the issue and believes that Plaintiffs' claims arise under both statutes, Section 1658(a) still applies to the claims at issue. (See U.S. Br. 17)

[2] Although this Court held in *Goodman* v. *Lukens Steel Co.*, 481 U.S. 656 (1987) that the State's personal injury statute would govern the limitations period under §1981 claims, it is inaccurate to describe the limitations issue as having been "settled" since 1987. That ruling, four years prior to the 1991 Civil Rights Act, has continued to spawn litigation in the States regarding the proper statute to be used. For example see, *Woodson v. International Broth. of Elec. Workers Local 292*, 974 F.Supp. 1256 (D.Minn. 1997); *Carney v. American University*, 151 F.3d 1090 (D.C. Cir. 1998).

'make and enforce' element of a Section 1981 claim." (Resp. Br. 9, 12-13, 36) That new argument is not only absurd but would require this Court to overrule both *Patterson v. McLean Credit Union,* 491 U.S. 164, 176-77 (1989) and *Rivers v. Roadway Express*, 511 U.S. 298, 304 (1994).

In *Patterson,* this Court held that the words "to make" contracts limited Section 1981 to discrimination only in the formation of a contract. This Court further held, not that Section 1981 should be narrowed despite its original intent, but that the 1866 statute was never meant to reach certain types of actions. According to this Court, Section 1981, as enacted in 1866, "protected just two rights: the right to make contracts, which 'extend[ed] only to the formation of a contract but not to problems that may later arise from the conditions of continuing employment,' and the right to enforce contracts, which 'embrace[d] protection of a legal process, and of a right of access to legal process, that will address and resolve contract-law claims without regard to race.'" 491 U.S. at 176-77. The *Patterson* Court did not merely hold that the plaintiff failed to prove one element of the claim or that the burdens were misapplied, it held that Section 1981 as a substantive right did not cover post-contract formation. After *Patterson*, there was no cause of action under Section 1981 for post-contract claims of discrimination in the terms and conditions of employment, which are precisely what the Plaintiffs claim here.

Compelled by the *Patterson* decision, this Court recognized in *Rivers* that Section 1981(b) created entirely *new legal obligations*. 511 U.S. at 304. Specifically, this Court held that the 1991 Act "enlarged the category of conduct that is subject to 1981 liability." *Id.* at 303. As this Court stated in *Rivers,* the interpretation of Section 1981 in *Patterson* is "an authoritative statement of what Section 1981 always

meant. A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.... (footnote omitted)...Thus, *Patterson* provides the authoritative interpretation of the phrase 'make and enforce contracts' in the Civil Rights Act of 1866 before the 1991 amendment went into effect on November 21, 1991." *Id* at 312-13.

Despite this Court's clear holding in *Rivers* that the 1991 Act and claims, like the Plaintiffs' herein, that are dependent on that Act create "entirely new legal obligations," (511 U.S. at 304) Defendant incredibly asserts that Plaintiffs' cause of action for employment discrimination "springs up" from the 1866 statute and that therefore claims under Section 1981(b) should rely on the past practice of borrowing state statutes of limitations. This conclusion is absurd. Plaintiffs' claims could not "originate in," or "spring up" from the original version of Section 1981 enacted in 1866, because this Court unambiguously so held in *Patterson*. Rather, the claims at issue in this case did not originate or spring up until 1991, when Congress passed the 1991 Civil Rights Act, an Act that, for the first time, made Plaintiffs' claims actionable under Section 1981.[3]

II. IT IS UNDISPUTED THAT PLAINTIFFS' CAUSE OF ACTION DID NOT EXIST UNTIL THE ENACTMENT OF THE 1991 CIVIL RIGHTS ACT

Defendant does not challenge the fact that Plaintiffs' cause of action for employment discrimination was "not actionable"

[3] Defendant's position that Section 1981(b) claims should rely on the past practice of borrowing state statutes of limitations is equally absurd in that it is the problems with this "borrowing" practice that led Congress to enact Section 1658(a) in the first place. (See U.S. Br. 22-24.)

(*Patterson*, 491 U.S. at 171) until the enactment of the 1991 Civil Rights Act, and in fact admits that it is "clear" in this case that Congress expanded Section 1981's scope to allow for Plaintiffs' cause of action. (Resp. Br. 2) Indeed, the Defendant has no choice here. In *Rivers*, this Court expressly held that the 1991 Civil Rights Act "create[d] liabilities that had no legal substance before the [1991] Act was passed". 511 U.S.at 313. Despite Defendant's admission that Plaintiffs had no cause of action under Section 1981 until the 1991 Act, Defendant contends that Plaintiffs' cause of action does not "arise under" the 1991 Act. Defendant reaches this conclusion by mischaracterizing both Plaintiffs' and the Government's position regarding the settled meaning of the phrase "arising under" and inventing its own unique definition. (Resp. Br. 35)

Defendant inaccurately asserts that both Plaintiffs and the Government base their interpretation of "arising under" under Article III's "federal ingredient test". (See, Resp. Br. 1, 9, 10, 19) However, both Plaintiffs and the Government clearly argue that Plaintiffs' cause of action arises under federal law and that the body of law defining "arising under" as used in the statutory jurisdiction context is the most natural rule to follow. As Plaintiffs argued in their brief, "Perhaps the most important of the statutes using the phrase 'arising under' is 28 U.S.C. 1331 which confers on federal district courts original jurisdiction over 'all civil actions arising under the constitution, laws, or treaties of the United States'"... "Plaintiffs' complaint relies on the 1991 Civil Rights Act and Section 1981(b) is an essential element of Plaintiffs' cause of action." (Pet. Br. at 12-13).

The Government's brief also articulates why the Court should interpret Section 1658(a)'s reference to "arising under" as incorporating the body of law developed under

Section 1331. (U.S. Br. 13 n.4) "[T]he natural conclusion is that Congress intended Section 1658(a)'s use of 'arising under' to have a similar meaning as Congress's use of that term in the well-known statutory jurisdiction provisions of the same title of the Code." (U.S. Br. 12) "Arising under" is an inclusive term as used both in Article III and in Title 28. But the statutory definition of "arising under" is, as this Court has recognized, narrower than the Article III definition of that term. See, *Franchise Tax Board v. Laborers' Vacation Trust*, 463 U.S. 1, 8-9 n.8 (1983); *Verlinden B.V. v. Central Bank of Virginia*, 461 U.S. 480, 494-495 (1983). The logical conclusion is that Congress adopted the statutory definition of arising under that it itself had used in the surrounding provisions of the United States Code.

Indeed, this Court has specifically recognized that Congress's use of the phrase "arising under" is "'strong evidence that Congress intended to borrow the body of decisional law that has developed under 28 U.S.C. § 1331.'" *Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 833 (2002) (quoting *Coastal States Mkt'g, Inc. v. New England Petroleum Corp.*, 604 F.2d 179, 183 (2d Cir. 1979)); See *Christianson v. Colt Indus. Operating Co.*, 486 U.S. 800, 808-809 (1988) ("[l]inguistic consistency" between Congress's use of the term "arising under" in different statutory provisions "demands" that the Court adopt a similar interpretation of the phrase). That rule of construction applies with particular force, where, as here, Congress invokes the term "arising under" in the same part of the United States Code (Title 28) in which that phrase was famously used by Congress to describe the jurisdiction of the federal courts. (See U.S. Br. 11-12.)

After misstating Plaintiffs' (and the Government's) position, the Defendant erroneously states that Plaintiffs have

added a "'newness' test" to Article III's ingredient test. (Resp. Br. 22-23; see U.S. Br. at 14). Defendant fails to appreciate the distinction between the meaning of "arising under" as used in Article III and the narrower meaning of that term as used in the jurisdictional provisions of Title 28 of the United States Code. Moreover, what Defendant belittles as a "'newness' test" is drawn from what this Court has called "[t]he most familiar definition of the statutory 'arising under' limitation," i.e., "Justice Holmes' statement, 'A suit arises under the law that creates the cause of action.'"[4] *Laborers Vacation Trust,* 463 U.S. at 8-9 (quoting *American Well Works Co. v. Laynes & Bowler Co.,* 241 U.S. 257, 260 (1916)) (emphasis added).

As explained in the Government's brief, this Court has built on that statutory definition of "arising under" in subsequent cases. (U.S. Br. 12-13) Thus, as this Court has stated in the context of construing 28 U.S.C. 1331 and 1338, a claim arises under a statute if either "(1) the statute creates the cause of action, or (2) the statute establishes a necessary

[4] Defendant's attempt (Resp. Br. 17) to muddle the definition of "arising under" by pointing to other areas outside of Title 28 of the Code in which Congress has used "arising under" should be rejected. There is no doubt that the most familiar definition of arising under is the one that Congress uses in the statutory jurisdiction context. The most reasonable conclusion is that Congress intended to adopt that meaning when it used the term in Section 1658(a). That conclusion is underscored by the fact that, unlike the Medicare and Social Security Act provisions cited by Defendant, Section 1658(a) is in the same Title of the United States Code as the jurisdictional provisions that use "arising under." (See, U.S. Br. 13 n.4) Defendant's reliance (Resp. Br. 18 & 21 n.9) on *Merrell Dow Pharm., Inc. v. Thompson,* 478 U. S. 804 (1986) is also misplaced. (See U.S. Br. 12 n. 3).

element of the claim, such that the plaintiff's right to relief necessarily depends on the statute." *Holmes Group,* 535 U.S. at 830; see also cases cited at U.S. Br. 12-13. This settled statutory definition of "arising under" is not novel by any stretch and, as discussed, it is the most natural reading of Section 1658(a) that Congress intended the phrase "arising under" in Section 1658(a) of Title 28 to have the same meaning as its use in the nearby provisions of Title 28.[5]

According to Defendant, Section 1658(a) applies "only when" Congress creates an "entirely new claim" that does not depend at all on a preexisting statute. (Resp. Br. 2, 14, 35) Plaintiffs were unable to find even one statute creating a private right of action that would benefit from Congress's enactment of Section 1658(a) if the Defendant's interpretation were to be adopted. Assuming that Congress intended Section 1658(a) to have a meaningful impact on the problem identified by the Federal Courts Study Committee, then it makes perfect

[5] Although Defendant claims (Resp. Br. 15) that it is wrong to "blithely" assume that Congress intended its use of the familiar term "arising under" in Section 1658(a) of Title 28 to have the same meaning of its use of that term in the surrounding jurisdictional provisions of Title 28, it is a settled rule of construction followed by this Court that when Congress borrows a well-known legal phrase it intends to adopt the settled meaning of that term. As Justice Frankfurter put it, when Congress uses a familiar term from "another legal source, whether the common law or other legislation, it brings the old soil with it". *Evans v. United States,* 504 U.S. 255, 260 n.3 (1992) (See U.S. Br. 9). The meaning of Section 1658(a)'s use of "arising under" is not, as Defendant suggests, "wholly distinct" (Resp. Br. 15) from its meaning in the jurisdictional provisions in Title 28. Rather, given its inclusive nature and well- settled meaning, it made perfect sense for Congress to borrow that term in establishing the causes of action subject to Section 1658(a).

sense that it would invoke an inclusive and well-settled phrase like "arising under" to describe the statute's reach and that reach would include all causes of action arising under all Acts of Congress enacted after December 1, 1990 regardless of whether or not the Act had "roots in" or "referenced" previous laws.

III. DESPITE DEFENDANT'S REPEATED ASSERTIONS THAT PLAINTIFFS' INTERPRETATION OF SECTION 1658(a) IS UNWORKABLE, DEFENDANT ITSELF ACKNOWLEDGES THAT THE APPLICATION OF SECTION 1658(a) IS "RELATIVELY EASY" IN THIS CASE

Throughout Defendant's brief, Defendant admits that *in Plaintiffs'* case the application of Section 1658(a) is straightforward, but it nevertheless asks this Court to rule against Plaintiffs because in the abstract hypotheticals offered by Defendant that same clarity *might* not exist. See Resp. Br. 2, It "*is clear*" that Congress *expanded* the scope of Section 1981, but "that clarity will not usually exist"; *Id.* at 11, "That determination *was relatively easy here* where Congress had expressly overruled a decision of this Court. But such clarity will rarely exist."; *Id.* at 26, "In this case, the nature of the 'new' claim is clear. *It is recognized that liability under Section 1981 was expanded*, because this Court had spoken on the scope of Section 1981 and Congress reversed the Court's interpretation in the Civil Rights Act of 1991. In many cases, however, that clarity will be lacking." However, what Defendant fails to appreciate is that it is Plaintiffs' "clear" case that is before this Court, not some lawyer-created hypothetical. Defendant's admissions that Plaintiffs case is "clear" and "easy" should be the basis for this Court's ruling, not Defendant's scare tactic hypotheticals.

Notwithstanding its admission, Defendant nevertheless claims that Plaintiffs' interpretation contravenes legislative intent by eliminating established limitations rules for claims arising under "many venerable statutory regimes." (Resp. Br. 11) Defendant, however, fails to point to *even one* such statutory regime. Defendant desperately argues that although it concedes that Plaintiffs' interpretation does not generate confusion in Plaintiffs' case, it would generate confusion and litigation under "numerous statutes whose limitations rules were thought to be settled." (Resp. Br. n. 5) In support of that theory, Defendant cites the statutes Plaintiffs cited at Pet. Br. 26-27. However, not one of those statutes cited had "well settled limitations rules". Defendant's hypotheticals are just that and Defendant has no *real* examples to espouse because there are no examples to support their feigned confusion. [6]

[6] Defendant's various arguments regarding the possibility of multiple statutes of limitations under Section 1981 are also misplaced. (Resp. Br. 24-25) In Plaintiffs' case none of the causes of action existed prior to the Civil Rights Act of 1991 and therefore the four-year statute should be the statute for the entire case. Even if this Court were to rule that the four-year statute would only apply to claims like Plaintiffs' (that were not viable until the 1991 Civil Rights Act) it would still not cause the confusion that Defendant suggests, because it is not uncommon to have several different statutes of limitations govern different claims in an action, even though the claims challenge the same alleged misconduct. For example, many plaintiffs that bring Section 1981 claims also bring Title VII claims and Title VII has its own specialized timing rules. (See U.S. Br. 27) In addition, lawyers filing actions under Section 1981 after *Rivers* had to be aware of the issues surrounding the 1991 Act because they would have to determine whether claims were viable given this Court's ruling in *Rivers* that claims added in the 1991 Act were not retroactive. In any event, Defendant's argument that the plain language of the Act should be disregarded because of *possible* confusion clearly contravenes established rules of statutory construction.

Under Defendant's strained interpretation, Section 1658(a) would be triggered "only when" Congress creates an "entirely new claim" that does not depend at all on a preexisting statute. (Resp. Br. 2, 14, 35.) While the Defendant spurs wildly unrealistic hypotheticals, it fails to identify even one statute creating a private right of action that would benefit from Congress's enactment of Section 1658(a) if the Defendant's interpretation were to be adopted. Plaintiffs challenged Defendant to find a statute that created a private right of action enacted after December 1, 1990, that did not have its own statute of limitations and which did not in any way have "roots in" or "otherwise reference" prior laws. (Pet. Br. 27) Defendants' brief was notably silent on this issue.

Because Defendant could not find any real examples of confusion that would be created by Plaintiffs' reading of the statute, Defendant attempts to create confusion by wildly suggesting that *every* statute amended by Congress will result in litigation over the proper statute of limitations. (Resp. Br. 2, 11, 28) That argument ignores the very language of Section 1658(a), which states "except as otherwise provided by law." If Congress does not want a new act, which may or may not have roots in a previous statute, to benefit from the "catch all" statute of limitations in Section 1658(a), it can and will provide a statute of limitations for the new cause of action. That is precisely what Congress did when it amended the Securities and Exchange Act of 1934, 15 U.S.C. 78(a) et. seq., and provided a different statute of limitations under the Sarbanes/Oxley amendment, 28 U.S.C. 1658(b), and similarly when Congress created a stand-alone cause of action, in the Family Medical Leave Act of 1993, 29 U.S.C. 2617(c). Certainly Congress's understanding of Section 1658(b) was that if they did not provide the amended Securities and Exchange Act with its own statute of

limitations, it would have been subject to the four-year statute under Section 1658(a), as would have the Family and Medical Leave Act.

It is difficult to believe that the Congress that enacted Section 1658(a) had such a limited and, indeed, practically worthless role in mind for that Section. And, more to the point, there is no reason to believe that Congress would have used the traditionally inclusive concept of "arising under" to characterize the scope of Section 1658(a) if it had such a limited role in mind for this statute.

IV. THE FACT THAT LOWER COURTS HAVE DISAGREED ON HOW TO INTERPRET SECTION 1658(a) DOES NOT MAKE THE STATUTE AMBIGUOUS

Defendant makes the circular argument that Section 1658(a) must be ambiguous because there has been confusion in the lower courts as to how to interpret the statute[7]. (Resp. Br. 16 & n.5) A split in the circuits on an issue of statutory interpretation does not necessarily signify that the underlying statute is ambiguous. *See, Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148, 2153 (2003) ("Our precedents make clear that the starting point for our analysis is the statutory text...[a]nd where, as here, the words of the statute are unambiguous, the judicial inquiry is complete.") (citations and internal quotation marks omitted).

[7] In making this argument Defendant attempts to list the various appellate decisions that have ruled on this question, but neglected to mention the recent Sixth Circuit opinion in *Anthony v. BTR Automotive*, 339 F.3d 506 (6th Cir. 2003) in which the Sixth Circuit found that Section 1658(a) applied to claims under 1981(b).

This Court routinely decides the question of whether a statute is ambiguous and those decisions typically follow numerous and contradictory findings by the lower courts. The fact that lower courts have construed statutes differently than this Court does not render a statute ambiguous. Indeed even the *Patterson* case, in which this Court found "by its plain terms" that the relevant provision in Section 1981 did not ever cover the claims that the Plaintiffs make here, followed decades of contradictory lower court decisions regarding the reach of Section 1981. 491 U.S. at 176-77. Although the definition of Section 1981 became "plain" upon this Court's pronouncement of the statute's meaning in *Patterson*, it was anything but "plain" prior to that holding.

Other examples of statutes that only became "unambiguous" after this Court so held, include: the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § 2000e-2(a)(1), 2000e-3(a), and 2000e-2(m), in *Oncale v. Sundowner Offshore*, 523 U.S. 75, 118 S.Ct. 998 (1998), *Robinson v. Shell Oil Co.*, 519 U.S. 337, 117 S.Ct. 843 (1997); the Voting Rights Act, 42 U.S.C. § 1973c, § 5, in *Presley, etc., v. Towah County Commission et al.*, 502 U.S. 491, 112 S. Ct. 820 (1992); Title II of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 337, 42 U.S.C. § 12131 *et. seq.*, in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952 (1998); the Federal Arbitration Act, 9 U.S.C. § 1, in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 121 S.Ct. 1302 (2001); and the Fair Labor Standards Act, 29 U.S.C. § 255(a), in *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677 (1988).

V. DEFENDANT'S ASSERTED CONCERNS ABOUT THE INTERESTS OF STATE ACTORS AND STATE SOVEREIGNTY ARE NOT ONLY BRAND NEW BUT ENTIRELY MISPLACED

Defendant inappropriately adds a new argument in its response brief claiming that Plaintiffs' interpretation of Section 1658(a) would result in waiving States' immunity from suit under Section 1981[8] and could be read to apply the statute of limitations to state claims against nonconsenting states.[9] (Resp. Br. 30-31) As there are no state actors or state

[8] Defendant's brief states (Resp. Br. 30), without citation to any authority, that "Congress has waived States' immunity to suit under § 1981." This is wrong. To abrogate the States' immunity from suit in federal court, Congress must "mak[e] its intention unmistakably clear in the language of the statute." *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73 (2000). "[E]vidence of Congressional intent must be both unequivocal and textual." *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989). Indeed, as the Court noted in *Jett* v. *Dallas Independent School Dist.*, 491 U.S. 701, 731-732 (1989), Section 1981 contains no express cause of action at all. The Court has inferred a cause of action against private entities for violation of Section 1981. *Ibid.* But the Court held in *Jett* that Section 1981 may be enforced against state actors only through the remedial provisions of 42 U.S.C. 1983. *Id.* at 731-736.

[9] Defendant's (Resp. Br. 30-31) and the amici States' (Br. 3, 10-12) reliance on the principle of *Raygor v. Regents of University of Minnesota*, 534 U.S. 533 (2002), is equally misplaced. The question in *Raygor* was whether the federal supplemental jurisdiction statute could be read to toll the statute of limitations on State claims against nonconsenting States. This case does not involve a State, so of course no state sovereignty issue is presented. More fundamentally, the legislative history of Section 1658(a) makes clear (136 Cong. Rec. §17570-02, 17581 (October

sovereignty issues in this case, these new arguments are entirely misplaced and, in any event, are without merit. See *Jinks v. Richland County S.C.,* 123 S.Ct. 1667, 1673 (2003) (distinguishing *Raygor* in considering claim of party that was "not state").

VI. CONCLUSION

For the reasons stated herein, and in Plaintiffs' Brief on the Merits, and for such other reasons as this Court deems just and appropriate, Plaintiffs ask this Court to find that the four-year statute of limitations set forth in 28 U.S.C. Section 1658(a) applies to all civil actions arising under Acts of Congress enacted by Congress after December 1, 1990, (unless otherwise provided by law) whether or not those civil actions are based on amended laws or laws that have roots in or otherwise reference earlier or preexisting law, and for such other and further relief as this Court deems just.

Respectfully Submitted,

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27, 1990)) that the statute only applies to federal claims, therefore the "*Raygor* issue" will never arise in applying Section 1658(a).

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No. 02-1205

In the Supreme Court of the United States

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v.

R.R. DONNELLEY & SONS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a claim for racial discrimination relating to the terms or conditions of employment in violation of 42 U.S.C. 1981 is governed by the uniform federal statute of limitations established by 28 U.S.C. 1658(a), or a varying limitaions period borrowed from the law of the forum state.

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In the Supreme Court of the United States

No. 02-1205

EDITH JONES, ET AL., ON BEHALF OF HERSELF AND A CLASS OF OTHERS SIMILARLY SITUATED, PETITIONERS

v.

R.R. DONNELLEY & SONS COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case involves 42 U.S.C. 1981 (Section 1981) and the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, which amended Section 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The availability of actions under Section 1981 affects the United States' role in enforcing Title VII and related civil rights laws. In addition, this case involves the four-year statute of limitations established by 28 U.S.C. 1658(a), which presumptively applies to any "civil action arising under an Act of Congress enacted after [December 1, 1990]," *ibid.*, and may apply in actions in which the United States or a federal entity is a party.

STATEMENT

1. a. Section 1981 of Title 42 U.S.C., one of the Nation's oldest civil rights laws, provides that "[a]ll persons within the jurisdiction of the United States shall have the same

right in every State and Territory to make and enforce contracts * * * as is enjoyed by white citizens." 42 U.S.C. 1981(a). In *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 171 (1989), this Court held "that racial harassment relating to the conditions of employment is not actionable under § 1981 because that provision does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations." Rather, the Court explained, Section 1981 protects only two "enumerated rights"—the right "'to make . . . contracts' and 'the same right . . . to . . . enforce contracts.'" *Id.* at 176 (quoting Section 1981). "Where an alleged act of discrimination does not involve the impairment of one of these specific rights," the *Patterson* Court instructed, "§ 1981 provides no relief." *Ibid.*

In 1991, in response to *Patterson*, Congress amended Section 1981 and prohibited discrimination with respect to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." Civil Rights Act of 1991 (1991 Act), Pub. L. No. 102-166, § 101, 105 Stat. 1071 (42 U.S.C. 1981(b)); see § 3(4), 105 Stat. 1071 (Congress's objective was to "expand[] the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination"); *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 305-308 n.6 (1994).[1] The 1991 Act thus made actionable the very type of employment discrimination that this Court

[1] Section 101 of the 1991 Act amended Section 1981 by redesignating the existing text of the statute as Section 1981(a) and adding subsections (b) and (c). § 101, 105 Stat. 1071. Subsection (b) states: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." § 101, 105 Stat. 1072. The text of Section 1981, as amended, is set forth in the appendix to this brief.

in *Patterson* held was "not actionable under § 1981." 491 U.S. at 171, 179, 189.

In *Rivers*, 511 U.S. at 300, this Court held that Section 101 of the 1991 Act—the part of the Act at issue in this case—does not apply to Section 1981 actions "that arose before [the 1991 Act] was enacted." The Court explained that, because Section 101 "creates liabilities that had no legal existence before the Act was passed," it does not apply to "preenactment conduct" given the absence of any indication that Congress intended it to apply retroactively. *Id.* at 313. The Court in *Rivers* thus affirmed the dismissal of plaintiffs' claims under Section 1981 for discriminatory discharge, which had accrued before 1991 and were not actionable under Section 1981, as construed in *Patterson*. *Id.* at 301-302.

b. Section 1981 does not set forth a statute of limitations. Following the choice-of-law analysis established by 42 U.S.C. 1988(a), however, courts in Section 1981 actions traditionally have borrowed the limitations period used by the forum state for personal injury actions. Under Section 1988(a), courts look to federal law and, if there is no suitable federal rule, apply the law of the forum state to the extent that doing so would not be inconsistent with federal law. See *Wilson* v. *Garcia*, 471 U.S. 261, 267 (1985). The state limitation periods that have been applied in Section 1981 actions vary from one State to the next, but generally range from two to six years. See note 8, *infra*.

c. On December 1, 1990, Congress enacted a new, catch-all statute of limitations for federal actions. Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, Tit. III, § 313(a), 104 Stat. 5114. It states that, "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than

4 years after the cause of action accrues." 28 U.S.C. 1658(a).[2] The statute was an outgrowth of the 1990 report of a committee appointed by the Chief Justice to propose long-range solutions to problems stemming from the increased size and complexity of the case load in federal courts. See *Report of the Federal Courts Study Committee* (1990).

2. Petitioners are African Americans who are former employees of respondent's Chicago manufacturing division and certain other divisions. In November 1996, they brought this class action alleging, *inter alia*, violation of their rights under Section 1981, as amended in 1991. J.A. 9-22. Petitioners allege discriminatory termination and refusal to transfer in connection with the closing of the Chicago division in July 1994, and maintenance of a racially hostile work environment. J.A. 18-19. Respondent moved for partial summary judgment on the ground that petitioners' Section 1981 claims are time-barred because they were brought more than two years after they accrued. Respondent explained that, under prior Seventh Circuit precedent, the statute of limitations for Section 1981 actions in Illinois is the two-year period established by state law for personal injury actions. Petitioners responded that their claims are timely because they are governed by the four-year period established by Section 1658(a). Pet. App. 4a-6a.

The district court held that Section 1658 governs the claims at issue. Pet. App. 28a-40a. The court read Section 1658 to mean that "whenever Congress, after December 1990, passes legislation that creates a new cause of action, the catch-all statute of limitations applies to that cause of

[2] In 2002, Congress amended Section 1658 to add a separate provision (subsection (b)) specifying the statute of limitations for certain securities law claims. Act of July 30, 2002, Pub. L. No. 107-204, § 804(a), 116 Stat. 801. The original catch-all provision of the 1990 Act was left unchanged but is now set forth in Section 1658(a).

action." *Id.* at 37a. Accordingly, the court reasoned, "claims that under *Patterson* could be brought under the pre-1991 version of § 1981 clearly arise under an Act of Congress that was enacted prior to § 1658's enactment date," while "[c]laims that *Patterson* said could not be brought under the pre-1991 version of § 1981, but which can be made only by virtue of § 1981(b), just as clearly arise under the Civil Rights Act of 1991, an Act of Congress enacted after § 1658." *Id.* at 37a-38a. Applying that understanding, the court held that petitioners' Section 1981 claims "arise under the 1991 Act, *see Patterson*, 491 U.S. at 176-77, and are therefore governed by § 1658[]." Pet. App. 40a. The district court certified its ruling for an interlocutory appeal pursuant to 28 U.S.C. 1292(b). Pet. App. 12a.

3. The Seventh Circuit reversed. Pet. App. 3a-27a. It concluded that Section 1658(a)'s reference to "an Act of Congress enacted" does not encompass an amendment to an existing statute. *Id.* at 18a-19a. Rather, the court explained, "when Congress amends a preexisting statute, it does not create a 'new act,' and claims arising under the statute as amended continue to arise under the preexisting statute." *Id.* at 20a. As a result, in the court's view, Section 1658(a) "applies only when an act of Congress creates a wholly new cause of action, one that does not depend on the continued existence of a statutory cause of action previously enacted and kept in force by the amendment." *Id.* at 22a.

Applying that construction, the court of appeals held that the Section 1981 claims at issue are not governed by Section 1658(a). The court acknowledged that "the type of claims on which [petitioners] seek relief did not exist post-*Patterson* and pre-§ 1981(b)." Pet. App. 22a. But although petitioners' claims "depend on" Section 1981(b), the court concluded that "the cause of action for post-formation conduct 'arises under' § 1981(a)," *i.e.*, the provision at issue in *Patterson*. *Id.* at 24a. In so holding, the court emphasized that "Congress chose to

overrule *Patterson* not by creating an entirely new statutory provision," but by supplying "a more precise definition" of the scope of Section 1981. *Id.* at 25a. In addition, the court found it "highly significant" that a committee report accompanying the 1991 Act referred to the fact that courts have historically borrowed state statute of limitations in adjudicating Section 1981 claims. *Ibid.*

SUMMARY OF ARGUMENT

The four-year statute of limitations established by 28 U.S.C. 1658(a) governs a claim for racial discrimination relating to the terms or conditions of employment in violation of 42 U.S.C. 1981—a claim that was not actionable until Congress's enactment of the Civil Rights Act of 1991.

A. By its terms, Section 1658(a)'s catch-all limitations period applies to any "civil action arising under an Act of Congress enacted after [December 1, 1990]," unless it is "otherwise provided by law." The pivotal issue in applying Section 1658(a) in this case is the meaning of "arising under." In common parlance, "arise" means to spring up or come into being. In addition, the term "arising under" has a well-known legal meaning in the context of jurisdictional statutes contained in the same title of the United States Code as Section 1658(a). In construing those statutes, this Court has consistently held that a claim "arises under" federal law either if federal law creates the cause of action or the complainant's right to relief necessarily depends on federal law.

B. A Section 1981 claim for racial discrimination relating to the terms or conditions of employment "arises under" the 1991 Act—and thus is subject to Section 1658(a)—under both the dictionary definition of "arise" and the term's common legal meaning. In *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), this Court held "that racial harassment relating to the conditions of employment is *not actionable* under § 1981." *Id.* at 171 (emphasis added). In *Rivers* v.

Roadway Express, Inc., 511 U.S. 298 (1994), by contrast, the Court recognized that the same discrimination *is* actionable by virtue of the 1991 Act, which, *inter alia*, expanded Section 1981 to protect "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" (42 U.S.C. 1981(b)). The claims at issue in this case therefore necessarily came into being and became actionable under the 1991 Act because they "had no legal existence before [the 1991] Act was passed." *Rivers*, 511 U.S. at 313.

The fact that a Section 1981 claim alleging discrimination relating to the terms or conditions of employment also depends on Section 1981(a)—the part of the statute at issue in *Patterson*—does not alter the conclusion that such a claim arises under the 1991 Act and thus triggers Section 1658(a). Section 1658(a) does not say that a claim must arise *solely* under an Act of Congress passed after December 1, 1990. In addition, in the jurisdiction context, this Court has long recognized that a claim may arise under federal law even if it is based only *partly* on federal law, as long as federal law creates the cause of action or supplies an essential element for obtaining relief. With respect to the Section 1981 claims at issue in this case, the 1991 Act both creates a cause of action and supplies an essential element of the cause of action, since before the 1991 Act those claims were "not actionable" (*Patterson*, 491 U.S. at 179) at all.

C. None of the secondary considerations relied upon by the court of appeals provides any basis for overriding the result clearly called for by the text of Section 1658(a). If a claim arises under an Act of Congress passed after December 1, 1990, then it is immaterial for purposes of Section 1658(a) whether such an Act amended an existing statute or created a stand-alone cause of action. Just as is true for purposes of the Court's retroactivity analysis, the focus must be on the substantive effect of the Act, not on whether the Act creates a new section of the United States Code, amends

an existing provision, or even simply "operates as a gloss on [existing] terms." *Rivers*, 511 U.S. at 304-305; see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994).

The court of appeals also erred in concluding that its constructon was necessary in light of legislators' goal—expressed in a committee report—to avoid disruption of litigants' settled expectations. Congress addressed that concern by making Section 1658(a)'s default limitations period prospective only, *i.e.*, by limiting it to claims arising under an Act of Congress passed *after* December 1, 1990. Moreover, as *Rivers* underscores in the context of the very type of claims at issue in this case, Acts of Congress that trigger Section 1658(a) by creating new causes of action inevitably will fall within *Landgraf*'s presumption against retroactive application, and so any retroactive effect will be expressly contemplated by Congress.

Congress presumably weighed the policy concerns expressed by the court of appeals concerning the administrability of Section 1658(a)'s arising-under rule and concluded that such concerns were outweighed by the significant federal interest served by creating a uniform (albeit prospective) federal limitations period for federal claims lacking such a period. Moreover, there is no reason to conclude that courts have encountered, or will encounter, any undue difficulty in determining which Section 1981 claims arise under the 1991 Act, and thus trigger Section 1658(a), and which Section 1981 claims do not. Accordingly, the court of appeals erred in holding that the claims at issue are governed by Illinois's two-year limitations rule for personal injury actions, instead of the uniform federal rule established by Section 1658(a).

ARGUMENT

THE UNIFORM STATUTE OF LIMITATIONS ESTABLISHED BY 28 U.S.C. 1658(a) GOVERNS ANY CLAIM FOR RACIAL DISCRIMINATION RELATING TO THE TERMS OR CONDITIONS OF EMPLOYMENT IN VIOLATION OF 42 U.S.C. 1981 THAT WAS NOT ACTIONABLE UNTIL THE CIVIL RIGHTS ACT OF 1991

A. Section 1658(a) Applies To Any Claim Or Cause Of Action That Was Created By Or Necessarily Depends On An Act Of Congress Enacted After December 1, 1990

1. This case is governed by elementary principles of statutory construction. First, Congress "says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992). Second, the Court "give[s] the words of a statute their ordinary, contemporary, common meaning, absent an indication Congress intended them to bear some different import." *Williams* v. *Taylor*, 529 U.S. 420, 431 (2000) (internal quotation marks omitted). Third, when Congress uses legal terms of art, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); accord *Beck* v. *Prupis*, 529 U.S. 494, 500-501 (2000). And fourth, when a "statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); accord *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002).

2. Section 1658(a) says that, "[e]xcept as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section [*i.e.*, after December 1, 1990] may not be commenced later than 4

years after the cause of action accrues." 28 U.S.C. 1658(a). As Judge Alito explained in his dissenting opinion in *Zubi* v. *AT&T Corp.*, 219 F.3d 220, 227 (3d Cir. 2000), the application of Section 1658(a) to the type of claims at issue in this case turns on the meaning of "three terms—'action,' 'Act of Congress,' and 'arising under'—each of which has a commonly understood legal meaning."

a. A "civil action" is a legal demand instituted in a court to enforce a right. See *Black's Law Dictionary* 26 (5th ed. 1979) ("Action" means "[t]he legal and formal demand of one's right from another person or party made and insisted on in a court of justice."); William C. Anderson, *A Dictionary of Law* 26 (1996) ("Civil action" seeks to "[r]ecover[] a private right or compensation for deprivation thereof."); Frederic J. Stimson, *Glossary of Technical Terms, Phrases, and Maxims of the Common Law* 7 (1881) ("Action" means "[t]he legal demand of one's right"; "[c]ivil action" is an action "to enforce a private right."). As the Tenth Circuit stated, "there is no question that 'civil action' as used in § 1658 means 'claim' or 'cause of action.'" *Harris* v. *Allstate Ins. Co.*, 300 F.3d 1183, 1190 (10th Cir. 2002).

b. An "Act of Congress" is a law enacted in accordance with the procedures set forth in Article I, Section 7 of the Constitution. See *INS* v. *Chadha*, 462 U.S. 919, 945-951 (1983). "[A]ll Acts of Congress" are required to have an "enacting clause" that states: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled." 1 U.S.C. 101. Acts of Congress are published in theUnited States Statutes at Large in the order in which they were enacted by each session of Congress and the Statutes at Large thus constitutes "legal evidence of laws." 1 U.S.C. 112.

c. In common parlance, "arise" means "[t]o come into being; originate." *American Heritage Dictionary* 99 (3d ed. 1992); see *Oxford English Dictionary* 445 (1933) ("Arise"

means "[t]o spring up, come above ground, into the world, into existence"). The term "arising under" also has a settled legal meaning in the jurisdiction context, the most familiar context where it is used, of which Congress presumably is aware. See *Beck*, 529 U.S. at 500-501; see also *Evans* v. *United States*, 504 U.S. 255, 260 n.3 (1992) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

Article III, Section 2 of the Constitution states that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties." As this Court observed in *Verlinden B.V.* v. *Central Bank*, 461 U.S. 480, 492 (1983), "[t]he controlling decision on the scope of Art. III 'arising under' jurisdiction is Chief Justice Marshall's opinion for the Court in *Osborn* v. *Bank of United States*, [22 U.S. (9 Wheat.)] 738 (1824)." In *Osborn*, Chief Justice Marshall explained that under Article III, a case arises under federal law whenever federal law "forms an ingredient of the original cause," even if "other questions of fact or of law may be involved in it." 22 U.S. (9 Wheat.) at 823; see also *Franchise Tax Bd.* v. *Laborers Vacation Trust*, 463 U.S. 1, 8-9 n.8 (1983).

More to the point, Congress itself has used the term "arising under" to establish the parameters of federal subject matter jurisdiction. See, *e.g.*, 28 U.S.C. 1331, 1338(a). In addition, Congress's use of the term "arising under" in the jurisdictional provisions of Title 28 of the United States Code—which governs the "Judiciary and Judicial Procedure"—tracks the way that Congress used the term in Section 1658(a) of Title 28. Compare 28 U.S.C. 1658(a) with 28 U.S.C. 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); 28 U.S.C. 1338(a)

("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks."). The natural conclusion is that Congress intended Section 1658(a)'s use of "arising under" to have a similar meaning as Congress's use of that term in the well-known statutory jurisdiction provisions of the same title of the Code.

As this Court has explained, "[t]he most familiar definition of the statutory 'arising under' limitation is Justice Holmes' statement, 'A suit arises under the law that creates the cause of action.'" *Laborers Vacation Trust*, 463 U.S. at 8-9 (quoting *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)). But the Court also has instructed that "arising under" is an inclusive term and "that a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law.'" *Merrell Dow Pharm., Inc.* v. *Thompson*, 478 U.S. 804, 808 (1986) (citing *Laborers Vacation Trust*, 463 U.S. at 9); see also *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988) (a case may "arise under" federal law if "federal law is a necessary element of [a claim]"); *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921) (The "general rule" is that federal-question jurisdiction is present when "right to relief *depends upon* the construction or application of the Constitution or laws of the United States.") (emphasis added).[3]

[3] In *Merrell Dow*, the Court held that "the presence of a federal issue in a state cause of action" is not sufficient to make the action one "arising under" federal law for purposes of Section 1331, when it is clear that Congress intended "no federal private cause of action" for violation of the federal law. 478 U.S. at 811-812; see *id.* at 812 ("The significance of the necessary assumption that there is no federal private cause of action * * * cannot be overstated."). There is no question that the rights at issue in this case are privately enforceable under federal law.

In *Holmes Group, Inc.* v. *Vornado Air Circulation Systems, Inc.*, 535 U.S. 826, 830 (2002), the Court observed in the context of construing 28 U.S.C. 1338(a)'s "arising under" language, that a claim "arises under" patent law if either (1) "federal patent law creates the cause of action," or (2) "the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal patent law." The Court derived that formulation from the "same test" used "to determine whether a case arises * * * under § 1331," because, the Court stated, the "[l]inguistic consistency" of Section 1338(a) and Section 1331 "requires" that result. *Ibid.*; see *Christianson*, 486 U.S. at 808-809 (adopting same interpretation). "Linguistic consistency" likewise calls for a similar understanding of the term in interpreting the "arising under" language of Section 1658(a).[4]

[4] The term "arising under" is also found in other parts of the United States Code. For example, in *Heckler* v. *Ringer*, 466 U.S. 602 (1984), this Court recognized that 42 U.S.C. 405(h) bars a federal court from exercising federal question jurisdiction to hear "all 'claim[s] arising under' the Medicare Act." 466 U.S. at 615 (quoting 42 U.S.C. 405(h)). The Court further explained that it has construed Section 405(h)'s "'claim arising under' language quite broadly to include any claims in which 'both the standing and the substantive basis for the presentation' of the claims is the [Medicare Act]." *Ibid.* (quoting *Weinberger* v. *Salfi*, 422 U.S. 749, 760-761 (1975)); see also *Your Home Visiting Nurse Servs., Inc.* v. *Shalala*, 525 U.S. 449, 456 (1999) (applying same construction of Section 405(h)). Although it may be somewhat broader, *Heckler's* construction of Congress's use of the term "arising under" in Title 42 of the Code is generally consistent with the construction that this Court has given to the term in the jurisdictional provisions of Title 28 of the Code. To be clear, however, in light of the placement of Section 1658(a) in Title 28 of the Code and the fact that the use of "arising under" is much more well-known in the jurisdictional context, in our view the most natural reading of Section 1658(a) is that Congress intended to adopt the meaning of "arising under" used in the statutory jurisdiction context.

B. Section 1658(a) Governs A Demand Under Section 1981 Based On Racial Discrimination That Was Not Actionable Until Congress Enacted The Civil Rights Act Of 1991

Section 1658(a)'s four-year statute of limitations applies to a claim for racial discrimination relating to the terms or conditions of employment—a claim that this Court in *Patterson* held is "not actionable under § 1981," 491 U.S. at 171, 179, 189, and that sprang into existence with enactment of the 1991 Act.

1. Section 1658(a)'s terms lead directly to the conclusion that its four-year limitations period applies to petitioners' Section 1981 claims. Congress has not "otherwise provided" (28 U.S.C. 1658(a)) a statute of limitations for Section 1981 claims, and this case involves a "civil action," (28 U.S.C. 1658(a)), or "legal and formal demand" (*Black's Law Dictionary*, *supra*, at 26) for enforcement of a right that did not exist before December 1, 1990, but rather was created by an Act of Congress—the 1991 Act—that was passed in accordance with Article I, Section 7 of the Constitution, contains an enacting clause, and was signed by the President on November 21, 1991. 1991 Act, 105 Stat. 1071. Moreover, as explained next, petitioners' claims clearly "aris[e] under" (28 U.S.C. 1658(a)) the 1991 Act, from which they sprang to life.

2. Petitioners' Section 1981 claims "arise under" the 1991 Act under both the literal and legal meaning of that term. As this Court's decisions in *Patterson* and *Rivers* underscore, a cause of action under Section 1981 for racial discrimination relating to the terms or conditions of employment literally did not "come into being" (*American Heritage Dictionary*, *supra*, at 99) or "spring up" (*Oxford English Dictionary*, *supra*, at 445) until the 1991 Act. In addition, a claim under Section 1981 for discrimination relating to the terms or conditions of employment "arises under" the 1991 Act under the most common meaning that this Court has

ascribed to that term in the statutory context: the cause of action for such discrimination was created by the 1991 Act and, at a minimum, is necessarily dependent on that Act.

a. The 1991 Act clearly gave rise to causes of action that had never existed under Section 1981. As discussed, *Patterson* held that "racial harassment relating to the conditions of employment is not actionable under § 1981." 491 U.S. at 171. The term "actionable" denotes "[t]hat for which an action may be maintained; opposed to *non-actionable*." *A Dictionary of Law*, *supra*, at 26.[5] *Patterson* thus definitively establishes that—before 1991—Section 1981 did not supply a cause of action for discriminatory conduct relating to the terms or conditions of employment. And, as this Court emphasized in *Rivers*, 511 U.S. at 312-313 & n.12, that is "an authoritative statement" of the action that had "*always*" existed under Section 1981.

The 1991 Act originated causes of action that "had no legal existence before th[at] Act was passed." *Rivers*, 511 U.S. at 313. As discussed, the Act expanded Section 1981 to proscribe racial discrimination relating to "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. 1981(b); see *Rivers*, 511 U.S. at 303 (The 1991 Act "enlarged the category of conduct that is subject to § 1981 liability"). By enlarging the "[m]atter for which action may be maintained" under Section 1981, and "[t]he right[s] which a party has to institute a judicial proceeding" under Section 1981, *Black's Law Dictionary*, *supra*, at 201, the 1991 Act created new causes of action under Section 1981 for relief from discrimination. See *Harris*, 300 F.3d

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[5] See also *Black's Law Dictionary*, *supra*, at 27 ("Actionable" means "[t]hat for which an action will lie, furnishing legal ground for an action. (See **Cause of action** * * *)."); *id.* at 201 ("Cause of action" is "[m]atter for which action may be maintained"; "[u]nlawful violation or invasion of right"; "[t]he right which a party has to institute a judicial proceeding.").

at 1190 ("when Congress enacted § 1981(b), it * * * undeniably created new causes of action."); *Zubi*, 219 F.3d at 230 (Alito, J., dissenting) ("[I]n any realistic sense, Section 101 of the 1991 Act 'create[d] the cause of action' for racially discriminatory termination of employment."); note 5, *supra*.

Petitioners in this case allege that they were subject to racially discriminatory decisions concerning the termination and transfer of employment and a discriminatory work environment. J.A. 18-19. Those claims were "not actionable" under Section 1981 before the 1991 Act because, *Patterson* held, the rights guaranteed by Section 1981 did "not extend * * * to conduct by the employer after the contract relation has been established, including * * * imposition of discriminatory working conditions." 491 U.S. at 177. Indeed, *Patterson* itself involved a hostile work environment claim, *id.* at 178-179, and *Rivers* involved a discriminatory discharge claim, 511 U.S. at 301. This Court held that those claims were not actionable under Section 1981 before the 1991 Act. The 1991 Act, however, created causes of action for racial discrimination with respect to the terms and conditions of the contractual relationship, see 42 U.S.C. 1981(b); *Rivers*, 511 U.S. at 303, and thus gave life to the type of discrimination claims brought by petitioners here.

b. That Congress in the 1991 Act chose to expand an existing cause of action, rather than legislate on a tabula rasa, does not alter the conclusion that the claims at issue "arise under" the 1991 Act. At a minimum, Section 1981 claims alleging discrimination in the terms and conditions of employment "necessarily depend[] on" (*Holmes Group*, 535 U.S. at 830) the 1991 Act. The "important new legal obligations" (*Rivers*, 511 U.S. at 304) created by the 1991 Act indisputably constitute a necessary element of the Section 1981 claims at issue, because—*Patterson* establishes—before the 1991 Act those claims were not actionable at all. See

Christianson, 486 U.S. at 808 (a case may "arise under" federal law if "federal law is a necessary element of [a claim]") (quoting *Laborers Vacation Trust*, 463 U.S. at 13). Indeed, even the court of appeals recognized that "post-formation discriminat[ion] claims *depend on* * * * [Section 101] in the sense that the definitional language of that subsection makes clear that 'make and enforce' includes post-formation conduct." Pet. App. 24a (emphasis added). That dependency alone compels the conclusion that the claims at issue "arise under" the 1991 Act under the alternative definition of "arising under" that this Court has used in the statutory jurisdiction context. See p. 12, *supra*.

Furthermore, Section 1658(a) does not specify that a claim must *exclusively* arise under an Act of Congress enacted after December 1, 1990, only that it must "aris[e] under" such an Act. Nor would such an interpretation be consistent with the way that this Court has used the term "arising under" in the statutory jurisdiction context where that term is inclusive. Indeed, this Court has often recognized that a claim may arise under *federal* law even though it is based on a *state* cause of action or involves both state and federal law. See *Laborers Vacation Trust*, 463 U.S. at 9 ("We have often held that a case 'arose under' federal law where the vindication of a right under state law necessarily turned on some construction of federal law.") (citing cases); *id.* at 13. As a result, to the extent that petitioners' Section 1981 claims depend on Section 1981(a)—as well as Section 1981(b)—that in no way undermines the conclusion that those claims arise under the 1991 Act. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 760-761 (1975) ("It would, of course, be fruitless to contend that appellees' claim is one which does not arise under the Constitution * * * . But it is just as fruitless to argue that this action does not also arise under the Social Security Act.") (applying 42 U.S.C. 405(h), discussed note 4, *supra*).

C. The Court Of Appeals Erred In Concluding That The Uniform Limitations Period Supplied By Section 1658(a) Does Not Apply To The Section 1981 Claims At Issue

The court of appeals grounded its contrary conclusion largely on policy and other secondary considerations. But none of the concerns identified by the court provides any reason to override the result clearly called for by the text of Section 1658(a).

1. The court of appeals reasoned that the *manner* in which Congress responded to *Patterson* barred application of Section 1658(a) to the claims at issue. The court emphasized that "Congress chose to overrule *Patterson* not by creating an entirely new statutory provision," but instead by "merely suppl[ying] a more precise definition to one of the rights already guaranteed by § 1981." Pet. App. 25a; see *id.* at 24a ("[I]t is 'only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies.'"). That analysis is flawed.

Most fundamentally, the court of appeals' reasoning is contradicted by the plain terms of Section 1658(a). Section 1658(a) is triggered when a claim "aris[es] under an Act of Congress enacted after [December 1, 1990]." The fact that an Act of Congress creates new rights by amending an existing statute, rather than by creating "a wholly new cause of action" without reference to another statute (Pet. App. 22a), is itself of no moment under Section 1658(a). See *Harris*, 300 F.3d at 1189-1190 ("[E]very Act of Congress, whether it reflects a never-before considered subject or amends a previously existing statute, is 'enacted'" and thus potentially may trigger Section 1658(a).).

Under the decision below, however, only a small fraction of Acts of Congress enacted after December 1, 1990, could ever trigger Section 1658(a), *i.e.*, the relatively few statutes that create an entirely free-standing cause of action. The

decision thus severely limits the application of Section 1658(a) on the basis of a criterion that has no footing in the text of that provision. Section 1658(a) makes clear that the proper focus is on the "Act of Congress enacted after [December 1, 1990]," not on how the statutory change is codified. Here, although the court of appeals recognized that petitioners' claims "depend on" (Pet. App. 24a) Section 101 of the 1991 Act, it found Section 1658(a) inapplicable simply because Section 101 amended an existing code provision.

The key question in determining whether Section 1658(a) applies is not whether an Act of Congress amends an existing statute or creates a free-standing cause of action, but instead whether the underlying claim *arises under* an Act of Congress enacted after December 1, 1990. Under the most common meaning of the phrase "arising under" used by this Court in the statutory context, the Section 1981 claims at issue here readily arise under an Act of Congress enacted after December 1, 1990, even though that Act amends an existing statute instead of creating an independent cause of action proscribing the same conduct. See Part B, *supra*; *Harris*, 300 F.3d at 1190 ("When Congress enacted § 1981(b), it * * * undeniably created new causes of action, whether or not that is how it chose to label what it had done.").

So too, for example, if Congress amended a statute that prohibited discrimination on the basis of gender (and did not specify a limitations period) to prohibit discrimination on the basis of national origin as well, a claim for national origin discrimination would arise under the new Act, and thus be governed by Section 1658(a). Conversely, if the amendment simply changed the applicable burden of proof, a subsequent claim under the statute would not arise under the new Act, or trigger Section 1658(a). An Act that changes the burden of proof or procedures governing a claim typically does not create a new right to maintain an action. In addition, although the new burden of proof might decide the success

or failure of the claim on the merits, the plaintiff's right to maintain the action would not *necessarily* depend on the new burden or procedure specified by Congress.

Nor is it significant, as the court of appeals believed, that the 1991 Act "merely supplied a more precise definition to one of the rights already guaranteed by § 1981." Pet. App. 25a. As this Court explained in *Rivers*, "[a]ltering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes." 511 U.S. at 308. Congress could have created a new cause of action for post-formation discrimination which *Patterson* held not actionable by fashioning a stand-alone statutory section, adding a wholly independent subsection to Section 1981, or, as it did, expanding the definition of the conduct covered by the existing provision. The substantive effect—*i.e.*, the creation of new rights of action and corresponding liabilities —would be exactly the same under each alternative. Congress's concern presumably is the substantive effect of its Acts, not the particular manner in which they are reflected in the United States Code. Indeed, to a degree, the Office of Law Revision Counsel, and not Congress as a deliberative body, ultimately chooses the form that a law takes when it makes its way into the Code. See 2 U.S.C. 285b; see also *North Dakota* v. *United States*, 460 U.S. 300, 311 n.13 (1983); *United States* v. *Welden*, 377 U.S. 95, 98-99 n.4 (1964); *Turner* v. *Glickman*, 207 F.3d 419, 428-429 (7th Cir. 2000).

The salient point is that, in this instance, the new definition created by Congress "create[d] liabilities that had no legal existence before the Act was passed." *Rivers*, 511 U.S. at 313. Likewise, this Court rejected the plaintiffs' argument in *Rivers* that the fact that "§ 101 operates as a gloss on the terms 'make and enforce contracts,'" altered the conclusion that "the important new legal obligations § 101 imposes bring it within the class of laws that are presumptively prospective." *Id.* at 304-305. So too, the fact that Congress

chose to expand the definition of the rights protected by Section 1981 does not alter the fact that in doing so it created significant new causes of action under Section 1981.

2. The court of appeals pointed to the fact that, in enacting Section 1658(a), "Congress * * * was concerned with disrupting litigants' settled expectations." Pet. App. 21a; see *id.* at 23a. In particular, the court relied on a statement in a committee report accompanying Section 1658(a), explaining the committee's decision to reject a proposal "to provide a fallback statute of limitations for *previously enacted legislation* lacking a limitations period" and instead to limit Section 1658(a) to prospective application. *Id.* at 21a-22a (emphasis added) (quoting H.R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990)). The committee's statement, however, does not support the court of appeals' interpretation in this case because recognizing that Section 1658(a) applies to claims arising under the 1991 Act does not disrupt the "settled expectations" of any litigants with respect to "previously enacted legislation." *Ibid.*

Congress squarely addressed the concern expressed in the committee report by making Section 1658(a) prospective, *i.e.*, by limiting Section 1658(a)'s four-year limitation period to claims "arising under an Act of Congress enacted *after the date of the enactment of [Section 1658].*" 28 U.S.C. 1658(a) (emphasis added). Applying Section 1658(a) to a claim that arises under the 1991 Act—which was enacted after Section 1658(a), and which *Rivers* held applies only prospectively—in no way disrupts the "settled expectations" of parties. As Judge Alito put it in *Zubi*, "[b]efore the enactment of the Civil Rights Act of 1991, no employer in New Jersey could have had a settled expectation that an action for discriminatory discharge brought under § 1981 would be subject to the state's two year statute of limitations for personal injury actions, since prior to that time, § 1981 did not authorize such an action at all. It was not until the 1991 Act that such an

action was possible, and by that point § 1658 had been enacted." 219 F.3d at 231 (dissenting). Accordingly, after enactment of Section 1658(a), the only reasonable expectation that an employer or employee could have had with respect to the limitations period that applies to a claim arising under the 1991 Act is that such a claim would be governed by the four-year period in Section 1658(a).[6]

The court of appeals not only erred in focusing on Congress's objective of not disrupting expectations under "previously enacted legislation," Pet. App. 21a, but it failed to account for the important interests served by subjecting federal claims to a uniform federal limitations period, as opposed to a varying limitations period borrowed from the law of the forum state. As Justice Scalia observed in *North Star Steel Co.* v. *Thomas*, 515 U.S. 29 (1995), "a uniform nationwide limitations period for a federal cause of action is *always* significantly more appropriate" than a limitations period that varies based on the law of the forum state. *Id.* at 37 (concurring in the judgment); see also *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1393 (7th Cir. 1990) (Posner, J., concurring) ("express[ing] reservations about the principle of 'borrowing' a period of limitations from one statute for use with another"), cert. denied, 501 U.S. 1250 (1991).

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[6] Under the *Landgraf-Rivers* analysis, any Acts of Congress that create new causes of action or liabilities, and thus trigger Section 1658(a)'s "arising under" language, necessarily will presumptively apply only prospectively. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994) (a statute is presumed to have only a prospective effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed"). As a result, Congress's own decision to apply Section 1658(a)'s presumptive limitations period only prospectively combined with this Court's retroactivity jurisprudence fully addresses any concerns about disrupting settled expectations.

The committee report cited by the court of appeals itself acknowledges the problems posed by borrowing limitations periods from state law for federal causes of action. As the committee explained:

> At present, the federal courts "borrow" the most analogous state or federal law limitations period for federal claims lacking limitations periods. This practice creates a number of practical problems. * * * It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods.

H.R. Rep. No. 734, *supra*, at 24; see 136 Cong. Rec. 36,292 (1990) ("Borrowing, while defensible as a decisional approach in the absence of legislation, appears to lack persuasive support as a matter of policy" and "results in undesirable variance among the federal courts.") (statement reporting bill to Senate). For similar reasons, the 1990 *Report of the Federal Courts Study Committee* (at 93) leading to Section 1658(a), urged Congress to establish uniform federal limitations periods for federal causes of action as well as a catch-all, federal limitations period for causes of action for which Congress has not established a specific limitations period.[7]

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[7] An analysis prepared for the Workload Subcommitee of the Federal Courts Study Committee focused on the problem posed by borrowing state statutes of limitations for federal claims lacking a federal limitations period and concluded that "there is little to be said in favor of the current situation and there seems to be no identifiable support for continuing this situation." Memorandum from R. Marcus, Assoc. Reporter, to Workload Subcomm. at 1 (Sept. 1, 1989), *reprinted in* 1 Federal Courts Study Committee, *Working Papers and Subcomm. Reports* App. (1990). In particular, the report emphasized that borrowing state limitations periods for

In *North Star Steel Co.*, 515 U.S. at 34 & n.*, this Court itself recognized that, whereas the expectation has been that federal courts may borrow a limitations period from state law when a federal statute does not establish a limitations period, "[t]he expectation is reversed for statutes passed after December 1, 1990, the effective date of 28 U.S.C. § 1658 (1988 ed., Supp. V)." In focusing on Congress's apparent interest to avoid the disruption of litigants' settled expectations under "previously enacted legislation," H.R. Rep. No. 734, *supra*, at 24, the court of appeals overlooked Congress's intent to ensure that Section 1658(a)'s limitations period would apply on a prospective basis to any claims arising under an Act of Congress enacted *after* December 1, 1990.

3. The court of appeals likewise disregarded the express statutory preference established by 42 U.S.C. 1988(a) for applying federal rules in adjudicating civil rights claims. As this Court has explained, Section 1988(a) establishes a "'three-step process' for determining the rules of decision applicable to civil rights claims," including claims under Section 1981. *Wilson*, 471 U.S. at 267. The first step is to look to "the laws of the United States, so far as such laws are suitable to carry [the Civil Rights Acts] into effect." 42 U.S.C. 1988(a). As this Court has observed, that "mandate implies that resort to state law—the second step in the process—should not be undertaken before principles of federal law are exhausted." *Wilson*, 471 U.S. at 268. The third step is to apply state law, but only "'so far as the same is not inconsistent with' federal law." *Id.* at 269 (quoting 42 U.S.C. 1988(a)). Section 1988(a) thus explicitly directs courts to

federal claims creates uncertainty for litigants, "makes outcomes very different for federal claimants in different places, invites forum shopping, and poses problems for joint resolution through class actions or related measures." *Id.* at 10.

give effect when feasible to "the predominance of the federal interest" in adjudicating federal civil rights claims. *Ibid.*

Section 1658(a)'s own terms establish that it applies to the civil rights claims at issue. But if there were any doubt about whether such claims are governed by Section 1658(a) or a state limitations period, then Section 1988(a) would require that such doubt be resolved in favor of applying the federal period supplied by Section 1658(a). Section 1658(a)'s four-year period is clearly "suitable to carry [the Civil Rights Acts] into effect." 42 U.S.C. 1988(a). Four years provides a uniform and fair limitations period for Section 1981 claims created by the 1991 Act. Indeed, limitations periods that courts have borrowed from state law in Section 1981 actions range from two to six years.[8] Therefore, this case should be guided by Congress's "first instruction" in Section 1988—"that the law to be applied in adjudicating civil rights claims shall be in 'conformity with the laws of the United States, so far as such laws are suitable.'" *Wilson*, 471 U.S. at 268; see also *id.* at 270 n.21.

4. The court of appeals found it "highly significant" that a committee report accompanying the 1991 Act stated that, "[i]n the absence of an express limitations period in section 1981, courts applying the statute have looked to analogous state statutes of limitations." Pet. App. 25a-26a (quoting H.R. Rep. No. 40, 102 Cong., 1st Sess. Pt. 1, at 63 (1991)). That statement, however, does not shed any light on this case. It comes from a section of a committee report that is addressed to a provision of the 1991 Act *other than* Section 101 of that Act—the provision that gave rise to the claims at

[8] See, *e.g.*, Pet. App. 26a-27a (two years); *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 662 (1987) (two years); *Gordon* v. *National Youth Work Alliance*, 675 F.2d 356, 358 n.1 (D.C. Cir. 1982) (three years); *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 198 (1st Cir. 1987) (six years).

issue in this case. See H.R. Rep. No. 40, *supra*, at 62-63. Moreover, the statement accurately describes the statute of limitations that *historically* had been applied in Section 1981 actions. *Ibid.* But the committee's historical observation that "courts applying [Section 1981] have looked to analogous state statutes of limitations" (*id.* at 63) does not illuminate the committee's views on whether a Section 1981 claim that were to arise—in the future—under a different provision of the 1991 Act (Section 101) would be governed by Section 1658(a).

In any event, a statement in a committee report cannot override "the conclusion * * * directed by the text of [a statute]," let alone a completely different statute passed by a previous Congress. *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 119-120 (2001); see *United States* v. *Gonzalez*, 520 U.S. 1, 6 (1997). This Court has "often observed" that the views of a subsequent Congress, much less a subsequent committee report, are "a hazardous basis for inferring the intent of an earlier [Congress]." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998). The committee report touted by the court of appeals contains no reference to Section 1658(a), and in all likelihood the staffer who drafted that report did not have Section 1658(a) in mind when describing the historical practice of borrowing limitations periods in Section 1981 actions. Indeed, the statement relied on by the court of appeals appears to have been simply lifted verbatim from earlier committee reports accompanying precursor bills to the 1991 Act, which were prepared *before* Section 1658(a) was even enacted into law in December 1990. See H.R. Rep. No. 644, 101st Cong., 2d Sess. Pt. 1, at 37, (1990) (describing same borrowing practice); S. Rep. No. 315, 101st Cong., 2d Sess. 29 (1990) (same).

5. The court of appeals speculated that applying Section 1658(a)'s statute of limitations to Section 1981 claims that arise under the 1991 Act and a different limitations period to

Section 1981 claims that do not would be impractical. Pet. App. 23a. Congress presumably weighed such policy concerns in enacting Section 1658(a), and, in any event, such concerns provide no basis for a court to override the result directed by the text of that statute. See *Holmes Group*, 535 U.S. at 833 ("Our task here is not to determine what would further Congress's goal of ensuring patent-law uniformity, but to determine what the words of the statute must fairly be understood to mean."); *Zubi*, 219 F.3d at 231 (Alito, J., dissenting) (In devising Section 1658(a), "Congress obviously thought that interests other than clarity and ease of application also had to be served to at least some degree."). That is particularly true because the final version of Section 1658(a) reflects a legislative compromise between interests favoring a more expansive provision that applied to any "previously enacted legislation lacking a limitations period" and interests favoring a more limited prospective approach. H.R. Rep. No. 734, *supra*, at 24.

At the same time, there is no reason to believe that applying Section 1658(a)'s four-year statute of limitations to Section 1981 claims arising under the 1991 Act will prove unworkable or unfair. As the Tenth Circuit observed in *Harris*, "courts routinely apply different statutes of limitations to different claims, including different claims made within a single lawsuit." 300 F.3d at 1191. Indeed, many lawsuits involving claims under Section 1981—including at least initially this case, see Pet. App. 29a—also involve claims under Title VII. Title VII specifies a different limitations framework for claims than the one in Section 1658(a). See 42 U.S.C. 2000e-5(e)(1); *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 109-110 (2002).

In addition, in the typical case, there is not likely to be confusion as to whether a Section 1981 claim arises under the 1991 Act. As discussed, the 1991 Act and *Patterson* draw a bright line based on whether a claim concerns "postforma-

tion conduct by the employer relating to the terms and conditions of continuing employment." *Patterson*, 491 U.S. at 179; see *Harris*, 300 F.3d at 1192-1193 & n.1. Courts did not find any undue difficulty in policing that line in assessing the lawfulness of pre-1991 conduct in light of *Rivers*'s holding that the 1991 Act is not retroactive. Moreover, in many cases there may be no need for any inquiry into whether a plaintiff's Section 1981 claims are governed by Section 1658(a) or a limitations period borrowed from state law because the claims would be timely (or not) regardless of which period applies, or because only one type of discrimination is alleged under Section 1981.

* * * * *

There is no dispute that the Section 1981 claims at issue in this case were "not actionable under § 1981" (*Patterson*, 491 U.S. at 179) when Congress enacted Section 1658(a), and that those claims are actionable today by virtue of the 1991 Act. The court of appeals' ruling that Section 1658(a) does not govern those claims is premised on the conclusion that the claims do not arise under the 1991 Act, but instead arise under the very statute at issue in *Patterson*. See Pet. App. 24a. That ruling defies common sense, contradicts Section 1658(a)'s terms, and severely undercuts the applicability of the uniform statute of limitations devised by Congress in Section 1658(a) to redress one of the major problems identified by the Federal Courts Study Committee.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. Section 1658 of Title 28 United States Code provides:

§ 1658 Time limitations on the commencement of civil actions arising under Acts of Congress

(a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

(b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—

(1) 2 years after the discovery of the facts constituting the violation; or

(2) 5 years after such violation.

2. Section 1981 of Title 42 United States Code provides:

§ 1981 Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

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IN THE
SUPREME COURT OF THE UNITED STATES

EDITH JONES, et al.,
Petitioners,

v.

R.R. DONNELLEY & SONS CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW; MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE; NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

The *amici* submit this brief with consent of the parties, in support of the Petitioners' argument that the Seventh Circuit improperly held that the four-year statute of limitations established under 28 U.S.C. § 1658 does not apply to the Petitioners' post-contract claims under 42 U.S.C. § 1981. Further, the *amici* contend that 28 U.S.C. § 1658 applies to all cases filed under 42 U.S.C. § 1981 involving discriminatory acts after the date of enactment of the Civil Rights Act of 1991, independent of whether these acts occurred before or after contract formation.[1]

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, nonprofit civil rights legal organization that was founded in 1963 by the leaders of the American bar, at the request of President John F. Kennedy, in order to provide legal representation to victims of civil rights violations. Over the last 40 years, the Lawyers' Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington have represented members of minority groups and women in hundreds of civil rights cases. In furtherance of its efforts to help defend the civil rights of minorities and the poor, the Lawyers' Committee has been continually involved as *amicus curiae* in cases before the Court involving the proper scope and coverage afforded by federal civil rights laws.

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[1] Counsel for *amici curiae* authored this brief in the entirety. No person or entity other than the *amici curiae*, their staff, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court rule 37.3.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a national civil rights organization established in 1968. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. MALDEF has litigated numerous cases under 42 U.S.C. § 1981 since the organization's founding. Preserving the right of Latinos to be free of discrimination in all aspects of employment is a primary goal of MALDEF's employment program.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest civil rights organization. The NAACP has state and local affiliates throughout the nation, including the State of Maryland where it maintains its national headquarters. The fundamental mission of the NAACP includes promoting equality of rights, eradicating caste and race prejudice among the citizens of the United States and securing for African Americans and other minorities increased opportunities for employment. The NAACP has appeared before courts throughout the nation in numerous important civil rights cases, including employment cases.

The National Asian Pacific American Legal Consortium ("NAPALC") is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its affiliates, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC and its affiliates have a long-standing interest in employment discrimination and civil rights issues that have an impact on the Asian Pacific American community, and this interest has resulted in

NAPALC's participation in a number of *amicus curiae* briefs before the courts.

The National Employment Lawyers Association ("NELA") is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been victims of unlawful employment discrimination. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

The Puerto Rican Legal Defense and Education Fund, Inc. ("PRLDEF") is a national non-profit civil rights organization founded in 1972. PRLDEF is dedicated to protecting and furthering the civil rights of Puerto Ricans and other Latinos through litigation and policy advocacy. Since its inception, PRLDEF has participated both as direct counsel and as *amicus curiae* in numerous cases throughout the country concerning the proper interpretation of the civil rights laws.

The precise issue before the Court is the appropriate statute of limitations for claims under 42 U.S.C. § 1981 based on discriminatory acts after contract formation. A decision here may also impact the issue of the proper statute of limitations applicable to all cases under 42 U.S.C. § 1981 involving discriminatory acts after the date of enactment of the Civil Rights Act of 1991, regardless of whether these discriminatory acts occurred before or after contract formation. This case is of significant importance to the preservation and enforcement of the rights of the clients and communities served by the *amici*.

SUMMARY OF ARGUMENT

The *amici* support the Petitioners' position that the four-year statute of limitations established under 28 U.S.C. § 1658 applies to all cases under 42 U.S.C. § 1981 involving discriminatory acts after contract formation. However, to the extent that the Court reaches the issue, the *amici* believe that the four-year statute of limitations established under 28 U.S.C. § 1658 applies to all cases under 42 U.S.C. § 1981 alleging discriminatory acts after the date of the enactment of the Civil Rights Act of 1991, independent of whether these acts occurred before or after contract formation.

The *amici's* interpretation that 28 U.S.C. § 1658 applies to all 42 U.S.C. § 1981 cases based upon discriminatory acts after the date of enactment of the Civil Rights Act of 1991 is consistent with the plain language of 28 U.S.C. § 1658 and the well-established meaning of the terms used in it. Civil actions under 42 U.S.C. § 1981 concerning discrimination after contract formation "arise under" the Civil Rights Act of 1991 because this discrimination was not actionable under 42 U.S.C. § 1981 until the passage of the 1991 law. Indeed, the Court recognized in *Rivers v. Roadway Express, Inc.*, that the amendments to § 1981 in the Civil Rights Act of 1991 "create[d] liabilities that had no legal existence before the Act was passed." 511 U.S. 298, 313 (1994).

Moreover, civil actions involving discriminatory acts prior to contract formation but after the Civil Rights Act of 1991 also "arise under" the 1991 Act. When Congress enacted the Civil Rights Act of 1991 to provide for new causes of action after contract formation under 42 U.S.C. § 1981, they chose to do so *not by creating a separate provision, but by creating a new, integrated cause of action*, which prohibits discriminatory acts either before or after

contract formation. After the Civil Rights Act of 1991, acts of employment discrimination, irrespective of whether the acts occurred prior to, during, or after contact formation, constitute a claim for violation of § 1981. Thus, the four-year statute of limitations applies to all claims under § 1981 that occur after the passage of the Civil Rights Act of 1991.

Further, applying a four-year statute of limitations for this new, integrated cause of action under § 1981, rather than applying different federal and state statutes of limitations, honors Congress' intent to establish a uniform statute of limitations for federal causes of action created after enactment of § 1658. Finally, an across the board four-year statute of limitations provides a "bright-line" test that is easily applied and understood by litigants and the courts, thereby promoting judicial efficiency and economy.

ARGUMENT

THE FOUR-YEAR STATUTE OF LIMITATIONS ESTABLISHED UNDER 28 U.S.C. § 1658 APPLIES TO ALL 42 U.S.C. § 1981 CIVIL ACTIONS BASED ON DISCRIMINATORY ACTIONS AFTER THE DATE OF ENACTMENT OF THE CIVIL RIGHTS ACT OF 1991

The *amici* urge the Court to decide that the four-year statute of limitations established under 28 U.S.C. § 1658 applies to all cases under 42 U.S.C. § 1981 alleging discriminatory acts after the date of enactment of the Civil Rights Act of 1991, independent of whether these discriminatory acts occurred before or after contract formation. At a minimum, the *amici* respectfully request that the Court accept the Petitioners' argument that the four-year statute of limitations established under 28 U.S.C. § 1658 applies to all cases under 42 U.S.C. § 1981 involving discriminatory acts after contract formation.

I. THE PLAIN LANGUAGE OF 28 U.S.C. § 1658 AND THE WELL-ESTABLISHED MEANING OF THE TERMS USED IN IT COMPEL THE INTERPRETATION THAT THE FOUR-YEAR STATUTE OF LIMITATIONS IN § 1658 APPLIES TO ALL § 1981 CASES.

28 U.S.C. § 1658, as originally enacted, states:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than four years after the cause of action accrues.

Judicial Improvements Act of 1990, Pub. L. 101-650, § 313(a), 104 Stat. 5089 (1990) (amended 2002).[2]

In interpreting a statute "[w]e begin by looking to the language of the Act. . . . [w]hen we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.'" *Rubin v. United States*, 449 U.S. 424, 429-30 (1981) (citations omitted). The Court has observed that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). Courts must presume that "Congress 'says in a statute what it means and means in a statute what it says there.'" *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)). Here, § 1658 says what it means and means what it says.

A. The Civil Rights Act of 1991 Is "An Act of Congress Enacted After the Date of Enactment" of 28 U.S.C. § 1658.

There is no dispute that this case involves a "civil action," i.e. the filing of a non-criminal complaint. Further, there can be little dispute that the Civil Rights Act of 1991 is an "Act of Congress enacted after the enactment" of 42

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[2] 28 U.S.C. § 1658, originally enacted in 1990, was amended in 2002, adding subsection (b) to provide for a separate statute of limitations for various claims of securities fraud. The original language of § 1658 remains the same; however, it is now subsection (a) of 28 U.S.C § 1658. To be clear, when the brief refers to § 1658, it is referring to the currently enacted § 1658(a).

U.S.C. § 1658, which was enacted in 1990. Most obviously, in passing "the Civil Rights *Act* of 1991," Congress included the term Act in its title, included the phrase "*[b]e it enacted*" in the preamble, and further noted that "*This Act* many be cited as the Civil Rights *Act* of 1991." Civil Rights Act of 1991, Pub. L. No. 102-166, Preamble and § 1, 105 Stat. 1071 (1991) (emphasis added).

Although the Civil Rights Act of 1991 did amend § 1981, those amendments are considered an "Act of Congress" because they created new causes of action. That the 1991 Act created new causes of action is beyond dispute. The Court recognized in *Rivers v. Roadway Express, Inc.*, the amendments to § 1981 in the Civil Rights Act of 1991 "create[d] liabilities that had no legal existence before the Act was passed." 511 U.S. 298, 313 (1994).

While not every amendment to an existing law would be an Act of Congress triggering the four-year statute of limitations in § 1658, certainly, amendments that create new rights and liabilities constitute an "Act that Congress enacted."[3] Most Congressional legislation proceeds by amendments to prior legislation. This practice provides efficiency by not requiring restatement and repetition of previously enacted law. As one court observed, "[t]o conclude that when Congress said 'an Act of Congress enacted,' it did not mean an 'amendment of an act,' is splitting hairs in too fine a way to make good sense. Any

[3] For example, any amendment that merely modifies the remedies or makes procedural or technical modifications without creating a new cause of action would not invoke the four year statute of limitations provisions of § 1658 because, as discussed in Section B *infra*, these amendments would not "aris[e] under and Act of Congress" as the phrase "arises under" has traditionally been applied and understood by the Court.

such interpretation seems to defy congressional intent rather than affirm it." *Rodgers v. Apple South, Inc.*, 35 F. Supp. 2d. 974, 976 (W.D. Ky. 1999).

B. All § 1981 Claims "Arise Under" the Civil Rights Act of 1991 Because the Act Creates the Cause of Action and Is a Necessary Element of Any Well-Pleaded § 1981 Complaint.

The crucial question is whether the Petitioners' claim "arises under" the Civil Rights Act of 1991. The term "arising under" has a long history of consistently applied meaning, which has been honored by the Court in interpreting identical language in other statutes.[4] In *Christianson v. Colt Indus. Operating Corp.*, the Court recognized that the term "arising under" has long been interpreted as meaning that the district court's jurisdiction "extends over 'only those cases in which a well-pleaded complaint establishes either that a federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.'" 486 U.S. 800, 808 (1988) (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983)). The *Christianson* Court relied on this established meaning in construing 28 U.S.C. § 1338(a), which confers jurisdiction over "any civil action arising under any Act of Congress relating to patents." 468 U.S. at 807 (quoting 28 U.S.C. § 1338(a)). The Court noted that,

> *Linguistic consistency, to which we have historically adhered*, demands that § 1338(a) jurisdiction likewise extend only to those cases in which a well-pleaded

[4] The most familiar use of the words "arising under" is in 28 U.S.C. § 1331 conferring original jurisdiction on federal district courts over "all civil actions arising under the Constitution, laws and treaties of the United States."

> complaint establishes either that federal patent law creates the cause of action or that the plaintiff's right to relief necessarily depends on a resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.

486 U.S. at 808-09 (emphasis added). In determining how the words "a civil action arising under an Act of Congress" in 28 U.S.C. § 1658 should be interpreted, the Court must determine whether the Civil Rights Act of 1991 either creates the cause of action or is a necessary element in one of the well-pleaded claims.

The Court in *Patterson v. McLean Credit Union*, held that 42 U.S.C. § 1981, as then worded, "extend[ed] only to the formation of [an employment] contract, but not to problems that may arise later from the conditions of continuing employment." 491 U.S. 164, 176 (1989). After *Patterson* and prior to the enactment of the Civil Rights Act of 1991, § 1981 did not cover discriminatory acts after contract formation, such as discrimination in the conditions of continuing employment or in the termination of employment. In enacting the Civil Rights Act of 1991, Congress, amended 42 U.S.C. § 1981 by defining the phrase "make and enforce contracts" to mean "the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). By defining the phrase "make and enforce contracts," Congress created new causes of action for which defendants could be held liable.

Indeed, in determining whether § 101 of the Civil Rights Act of 1991, which amends § 1981, could be applied retroactively, the Court in *Rivers* recognized that § 101

"enlarged the category of conduct that is subject to § 1981 liability. . . . establishing a *new* standard of conduct." 511 U.S. 298, 303-304 (emphasis added). The *Rivers* Court concluded that because the amendments to § 1981 contained in § 101 of the Civil Rights Act of 1991 "*create[d] liabilities that had no legal existence before the [1991] Act was passed*," it would be inappropriate to apply this new cause of action retroactively. 511 U.S. at 313 (emphasis added). Accordingly, under the well-established meaning of the term "arising under," the enactment of the Civil Rights Act of 1991 is an essential element in any civil action involving discrimination after contract formation under 42 U.S.C. § 1981, because the Petitioners had no cause of action for these claims of discrimination prior to the Civil Rights Act of 1991.

Further, civil actions involving discriminatory acts prior to contract formation but after the enactment of the Civil Rights Act of 1991 also "arise under" this Act and are entitled to the four-year statute of limitations. When Congress decided to create a claim for discriminatory acts after contract formation as violations covered under § 1981, it could have accomplished this goal by adding a separate provision to 42 U.S.C. § 1981 covering post-contract discrimination. Instead, it chose to create a new, integrated cause of action through § 1981(a), which now outlaws discriminatory acts both before and after contract formation. Congress created one unified cause of action, specifically allowing interrelated claims of discrimination, both before and after contract formation, to be treated together as a violation of the same provision, § 1981(a).

A review of the text demonstrates such intent. The full text of § 1981, as amended by the Civil Rights Act of 1991, reads:

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under the color of State law.

42 U.S. C. § 1981.

The Civil Rights Act of 1991 created the current version of § 1981, and the ensuing new integrated cause of action, by putting an (a) in front of the prior one sentence text of § 1981, and adding sections (b) and (c). While the words of section (a) remained the same, the meaning of the words in (a) changed substantially when section (b) was added to define the phrase "make and enforce contracts." As

the Court in *Rivers* held, this amendment "enlarged the category of conduct subject to § 1981 liability." 511 U.S. at 303.

The Seventh Circuit below correctly observed that § 1981(b) cannot stand on its own. *Jones v. R.R. Donelley & Sons Co.*, 305 F.3d 721, 727 (7th Cir. 2002) (recognizing that "[a]n action to recover for discriminatory post-formation treatment simply cannot be based solely on § 1981(b). Indeed, without § 1981 (a), § 1981(b) is meaningless"). Although certain causes of action are *made possible* by § 1981(b), there is no such thing as a § 1981(b) claim. Instead, section (b) merely defines what constitutes actionable conduct outlined in section (a). Significantly, section (b) is titled, "'Make and enforce contracts' *defined*." 42 U.S.C. § 1981(b) (emphasis added).

A cause of action is made under this new integrated § 1981, combining the old language now incorporated in § 1981(a) with the new meaning given by § 1981(b). In accordance with this Court's decision in *Rivers*, because this integrated cause of action "establish[es] a *new* standard of conduct" that did not exist prior to the enactment of the Civil Rights Act of 1991, it "arises under" the Civil Rights Act of 1991. 511 U.S. at 304, 313 (emphasis added). Therefore, consistent with the plain language of § 1658, this new integrated cause of action is subject to the four-year statute of limitations, regardless of whether the discriminatory acts occurred before or after contract formation.

C. The Seventh Circuit's Decision to Confine 28 U.S.C. § 1658 to Situations When Congress Establishes a New Cause of Action "Without Reference To Preexisting Law" Is Not in Accordance with the Plain Meaning of the Language or Any Known Usages of the Terms in § 1658.

The court below joined with a split panel of the Third Circuit and the Eighth Circuit in holding that it is "only when Congress establishes a new cause of action without reference to preexisting law that § 1658 applies." *Jones*, 305 F.3d at 728 (quoting *Zubi v. AT&T Corp.*, 219 F.3d 220, 225 (3d Cir. 2000)); *see also Madison v. I.B.P.*, 257 F.3d 780, 798 (8th Cir. 2001). Nowhere can the concept of "without reference to preexisting law" be found in the plain language of § 1658, or from analyzing the established meaning of the terms used therein. As the Court has recognized, "[w]hen the language is plain, we have no right to insert words and phrases, so as to incorporate in the statute a new and distinct provision." *United States v. Temple*, 105 U.S. 97, 99 (1981). As demonstrated in Section A *supra*, even an amendment of a statute is an Act of Congress. As aptly observed in the dissent in *Zubi*, the interpretation that "an Act of Congress that establishes a new cause of action but refers to 'preexisting law' in doing so does not qualify as 'an Act of Congress' within the meaning of § 1658 . . . is not consistent with any known usage of the term." 219 F.3d at 231.

The Seventh Circuit bases its cramped interpretation on the belief that "[t]he language [of § 1658] simply does [not] address the eventuality when a cause of action 'arises under' two different 'Acts', one enacted before and one enacted after the effective date of § 1658." *Jones*, 305 F.3d at 724. This is simply not true. As explained in Section B *supra*, in accordance with the well-established meaning of the words "arising under," the law requires only that the act

"is a necessary element of one of the well-pleaded . . . claims." *Franchise*, 463 U.S. at 27-28. It is not at all unusual to have a cause of action "arise under" two or more acts. The Court faced this issue squarely in *Weinberger v. Salfi*, when it stated:

> The argument is that the present action arises under the Constitution and not under Title II [of the Social Security Act.] It would, of course, be fruitless to contend that [the plaintiffs'] claim is one which does not arise under the Constitution, since their constitutional arguments are critical to their complaint. But it is just as fruitless to argue that this action does not *also* arise under the Social Security Act.

422 U.S. 749, 760 (1975) (emphasis added).

In short, the Seventh Circuit's approach distorts the plain language of § 1658 as well as the consistently applied meaning of terms used therein. In doing so, it undermines the legislative intent behind § 1658 and instead creates a rule that will provide no uniformity in application.

D. A Holding That 28 U.S.C. § 1658 Applies to All Cases Under 42 U.S.C. § 1981 Based on Discriminatory Acts After Enactment of the Civil Rights Act of 1991 Is Most Consistent With Congress' Own Application of § 1658.

When Congress has created, through amendment, a new cause of action and they did not intend for § 1658 to apply, they have made it clear. For instance, an insight into Congress' application of § 1658 is gleaned by their treatment of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. The Securities Exchange Act of 1934 includes a private right of action for various types of

securities fraud. Similar to the Civil Rights Act of 1991, the Sarbanes-Oxley Act of 2002 amended the definition of "securities laws" in the Security Exchange Act of 1934 to expand the types of fraud violations eligible for a private right of action. 116 Stat. 745, 749 (2002). Thus, like the Civil Rights Act of 1991, the Sarbanes-Oxley Act created a new integrated cause of action, expanding what actions had been covered under the Securities Exchange Act of 1934.

Congress in the Sarbanes-Oxley Act, however, amended § 1658 to ensure that the four-year statute of limitations would not automatically apply to this new integrated cause of action.[5] In particular, Congress inserted an "(a)" before the prior wording of § 1658 and then added section (b), which provides:

> (b) Notwithstanding subsection (a), a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of—
>
> (1) 2 years after the discovery of the facts constituting the violation; or
> (2) 5 years after such violation.

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[5] In this case, Congress wished to extend the 1 year and 3 year limitation periods mandated by the Supreme Court, in *Lamph v. Gilbertson*, 501 U.S. 350, 354-55 (1991), for private rights of action under § 10(b) of the Securities Exchange Act of 1934. *See* S. Rep. 107-146, at 17-18 (2002). Congress used its understanding of the effect of an amendment to an existing piece of legislation in making applicable the provisions of § 1658, as a device to effectuate this desire.

116 Stat. 745, 804. Given the addition of section (b) and, in particular, the use of the words "notwithstanding subsection (a)," it is reasonable to infer that Congress believed, in the absence of such an amendment to § 1658, the four-year statute of limitations under this section would apply to the new cause of action it created by amending (through the Sarbanes-Oxley Act) the Securities Exchange Act of 1934. In other words, where Congress wants to provide for a specific statute of limitations other than four years outlined in § 1658(a), it has expressly done so.

Moreover, in amending § 1658 to include section (b), Congress referred not only to the new claims that had been made possible by enacting the Sarbanes-Oxley Act, but to *all* private rights of action that existed under the Security Exchange Act of 1934. 28 U.S.C. § 1658 (b). Congress named the entire Securities Exchange Act of 1934 in section (b), suggesting that it believed the four-year statute of limitations would otherwise apply to *all* private rights of action for securities fraud, not just the ones added by the Sarbanes-Oxley Act. 28 U.S.C. § 1658(b) (emphasis added). When Congress passed the Civil Rights Act of 1991, they were well aware of the impact of § 1658, having enacted it only one year before. Had Congress intended for some other limitations period to apply other than that provided for in § 1658, they would have expressly provided for it as they did in amending the Securities Exchange Act of 1934.

II. AN ACROSS THE BOARD FOUR-YEAR STATUTE OF LIMITATIONS REFLECTS CONGRESSIONAL INTENT TO SIMPLIFY THE FEDERAL JUDICIARY'S TASK BY REDUCING THE BORROWING OF STATE LIMITATIONS.

Applying a four-year statute of limitations to all § 1981 claims after enactment of the Civil Rights Act of 1991 most consistently reflects legislative intent. When Congress enacted § 1658, it hoped to limit the extent to which federal courts had to borrow state statute of limitations while not upsetting the settled expectations of potential litigants. A uniform four-year statute of limitations would accomplish these goals most effectively, as well as increase judicial economy and reduce confusion among litigants.

A. An Across The Board Four-Year Statute Of Limitations Significantly Reduces The Need Of Federal Courts To Borrow State Statutes Of Limitations.

By enacting § 1658, Congress aimed to limit the practice of borrowing the most analogous state statute of limitations for federal claims. Many federal courts and a Federal Courts Study Committee established by Congress had called upon Congress to enact uniform federal statutes of limitation. *See, e.g., Sentry Corp. v. Harris,* 802 F.2d 229, 246 (7th Cir. 1986) (observing "[w]e join the growing number of commentators and courts who have called upon Congress to eliminate these complex cases, that do much to consume the time and energies of judges but that do little to advance the cause of justice, by enacting federal limitations periods for all federal causes of action."); *see also London v. Coopers & Lybrand,* 644 F.2d 811, 813 (9th Cir. 1981).

The House Report for § 1658 recognized that borrowing "creates a number of practical problems," and explained that,

> It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods.

H.R. Rep. No. 101-734 at 24 (quoting Report of the Federal Courts Study Committee at 93). There are other obvious problems caused by the practice of borrowing. For example, use of state limitation periods that vary across the country pose temptations for forum shopping. This is especially problematic when plaintiffs in one case arising out of same controversy are from different states. Furthermore, borrowing requires federals court to master state law issues instead of relying on federal law.

An across the board four-year statute of limitations honors Congressional intent by significantly reducing the need of federal courts to borrow state statutes of limitation. Federal courts would impose a four-year statute of limitations for all § 1981 claims based on violations that occurred after the enactment of the Civil Rights Act of 1991. Only claims based on violations of § 1981 before the Civil Rights Act of 1991 would require borrowing of state statutes of limitations. This would improve judicial economy as federal courts would no longer have to search for and apply the most analogous state statute of limitations. In addition, an across the board four-year statute of limitations would provide consistency in federal courts across the country and

avoid problems that may arise when plaintiffs are from different states.

B. An Across the Board Four-Year Statute of Limitations Does Not Upset Settled Expectations.

Although wanting to limit the need to borrow state statute of limitations, Congress remained wary of upsetting the settled expectations of potential litigants. As a result, Congress chose not to impose the four-year statute of limitations retroactively, and instead limited the effect of § 1658 to subsequent Acts of Congress. As noted *supra*, Part I, Section B, the Civil Rights Act of 1991 created a new integrated cause of action under § 1981 combining coverage of discriminatory acts, independent of whether such acts occur before or after contract formation. This integrated cause of action did not exist in 1990, so no party could have settled expectations for such a claim. *Rivers*, 511 U.S. at 304 (recognizing that the 1991 Act "establish[ed] a new standard of conduct").[6]

C. An Across the Board Four-Year Statute of Limitations Injects Certainty and Consistency Into the Judicial Administration of § 1981 Claims.

In addition to reflecting Congressional intent, a four-year statute of limitations for all § 1981 claims is easily understood and applied. The Court has previously recognized advantages of bright-line tests and rules in other

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[6] In order to avoid upsetting reasonably held expectations, the relevant state statutes of limitations would still apply to any violations of § 1981 that occurred prior to date of the enactment of the Civil Rights Act of 1991.

contexts. For example, the Court rejected a definition of the term employee under Title VII that would "turn the coverage determination into an incredibly complex and expensive factual inquiry." *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 210 (1997); *see also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (rejecting an approach for defining employee that was "infected with circularity and unable to furnish predictable results").

Under an across the board approach, federal judges would only have to determine if the potential violations occurred after enactment of the Civil Rights Act of 1991 before imposing a four-year statute of limitations. This "bright-line" test would lead to increased efficiency and clarity. Judges would no longer have to engage in potentially fact-intensive inquiries to determine if claims were based on pre or post contract discrimination, and they would rarely have to search for the most analogous state statute of limitations.[7] Potential litigants, as well, could rely on an easily understood rule instead of wondering whether a state statute of limitations will apply and if so which one. As one court correctly observed, "[a]pplying section 1658 to

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[7] Under the Seventh Circuit approach, courts would need to engage in a fact-intensive analysis to first decide whether the claim before them is one for the making of contract claims (ones that *Patterson* recognized) or one for discrimination in the terms and conditions of employment (ones that *Patterson* did not recognize but now exist under the Civil Rights Act of 1991). This first step is no easy task. For example, as the Court in *Patterson* recognized, a promotion claim may or may not be a claim for the formation of a contract observing that it "depends upon whether the nature of the change in position was such that it involved the opportunity to enter into a new contract with the employer." 491 U.S. at 195. After a court sorts through this fact-intensive analysis, it then would need to determine the most applicable personal injury statute of limitations—another fact-laden inquiry. Congress in 1991 avoided this quagmire by creating the unified integrated § 1981 claim in which the four-year statute of limitations under § 1658 would apply to all claims.

claims arising after the enactment of the 1991 amendment is consistent with the cut-off for applying the amendment itself, and once the transitional cases clear the courts, ensures that a single statute of limitation will apply to all Section 1981 claims nationwide. In the long run, applying Section 1658 results in less, not more confusion." *Alexander v. Precision Machinery, Inc.*, 990 F. Supp. 1304, 1308 (D. Kan. 1997).

CONCLUSION

For the foregoing reasons, the *amici* respectfully request that the judgment of the Seventh Circuit be reversed. Moreover, the *amici* respectfully suggest that the best alternative would be to apply the four-year statute of limitations under 28 U.S.C. § 1658 to all civil actions under 42 U.S.C. § 1981 based on discriminatory actions after enactment of the Civil Rights Act of 1991, irrespective of whether the acts took place before or after contract formation.

Respectfully submitted,

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IN THE

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v.

R.R. DONNELLEY & SONS COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* with the consent of the parties.[1] The brief urges affirmance of the Seventh Circuit's decision below, and thus supports the position of the respondent, R.R. Donnelley & Sons Company.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. A letter of consent from counsel for each party has been filed with the Clerk of the Court.

promote sound policies and programs to end employment discrimination. Its membership now comprises more than 330 of this nation's largest private sector companies, collectively employing over 20 million people throughout the United States.

EEAC members are firmly committed to the principles of nondiscrimination and equal employment opportunity. Nevertheless, as large employers, they are subject to suits under numerous antidiscrimination laws, including 42 U.S.C. § 1981. As potential defendants in such actions, EEAC members have a direct interest in the issue presented to the Court in this case—*i.e.*, whether, as the Seventh Circuit concluded below, all Section 1981 claims are governed by the forum state's personal injury statute of limitations, or as the petitioners contend, some Section 1981 employment discrimination claims are governed instead by the four-year, federal "fall-back" statute of limitations codified at 28 U.S.C. § 1658.

The issue is of great practical importance to EEAC's members, the vast majority of which have employees in multiple states. Most states' statutes of limitations preclude personal injury claims not brought to court within two or three years. In those states, adoption of the rule advocated by the petitioners, as opposed to the one applied by the Seventh Circuit in this case, would greatly expand the number and scope of stale claims that potentially could be brought against employers under Section 1981.

Because of its members' interest in the scope of Section 1981 as applied to employment, EEAC filed *amicus curiae* briefs in many of the cases cited in the parties' briefs and lower court opinions in this case, including *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), and *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). Thus, EEAC's interest in, and experience with, the issue presented for the Court's consideration in this case are both substantial and long-standing.

STATEMENT OF THE CASE

This case began with the filing of a complaint in the Northern District of Illinois on November 25, 1996, alleging that R.R. Donnelley & Sons Company violated 42 U.S.C. § 1981 by, *inter alia*, discriminating against African-Americans whose employment it had terminated in conjunction with the closing of its Chicago Manufacturing Division (CMD) on or about July 29, 1994. The plaintiffs' claims included allegations of discriminatory terminations, discriminatory transfers, and maintenance of a racially hostile work environment.

Donnelley moved for summary judgment on all claims by the former CMD employees on the ground that their employment had ended more than two years before the filing of their complaint, and their claims therefore were time-barred. Donnelley relied on the traditional rule that, because Section 1981 does not contain a statute of limitations, courts considering Section 1981 claims will apply the personal injury statute of limitations of the state in which the claims arise, which in Illinois is two years.

The district court denied the motion. It ruled in *Adams v. R.R. Donnelley & Sons Co.*, 149 F. Supp.2d 459, 462-64 (N.D. Ill. 2001)[2], that the discriminatory termination and hostile environment claims in this case were governed, not by the two-year Illinois statute of limitations, but rather by the four-year, federal "catch-all" statute of limitations codified at 28 U.S.C. § 1658, which applies to any "civil action arising under an Act of Congress enacted after [December 1, 1990]."

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[2] *rev'd sub nom. Jones v. R.R. Donnelly & Sons Co.*, 305 F.3d 717 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 2074 (2003).

The district court reasoned that, because allegations of race discrimination in termination of employment and maintenance of a racially hostile work environment were not actionable under Section 1981 as interpreted by this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), but became actionable as a result of the amendment to Section 1981 contained in the Civil Rights Act of 1991, the termination and hostile environment claims in this case were claims "arising under" the Civil Rights Act of 1991. *Id.* And, since the 1991 Act was enacted after Section 1658's effective date of December 1, 1990, the district court concluded that Section 1658's four-year statute of limitations applied to those claims.[3] *Id.* at 465. Accordingly, the district court denied Donnelley's motion for summary judgment, *id.*; however, it certified the statute of limitations question for interlocutory appeal.

On review, the Seventh Circuit reversed. *Jones v. R.R. Donnelley & Sons Co.*, 305 F.3d 717 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 2074 (2003). The court of appeals concluded that all of the petitioners' Section 1981 claims arose under the original, prohibitory language of Section 1981, not under the new, definitional provision added by the Civil Rights Act of 1991. *Id.* at 727. Having thus found that the claims arose under a preexisting statute, the Seventh Circuit held that Section 1658 did not apply and that all of the petitioners' claims were subject to Illinois' two-year statute of limitations. *Id.* at 728.

The Third and Eighth Circuits also have found Section 1658 inapplicable to Section 1981 claims. *Zubi v. AT&T Corp.*, 219 F.3d 220 (3d Cir. 2000); *Madison v. IBP, Inc.*, 257

[3] The district court reserved judgment on whether other types of discrimination alleged in the complaint might have been actionable under Section 1981 before the 1991 amendments, and therefore might be subject to the two-year Illinois limitations period. *Id.* at 465.

F.3d 780 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 919 (2002). The Sixth and Tenth Circuits have reached the opposite conclusion. *Anthony v. BTR Auto. Sealing Sys., Inc.*, 339 F.3d 506 (6th Cir. 2003); *Harris v. Allstate Ins. Co.*, 300 F.3d 1183 (10th Cir. 2002). This Court granted certiorari to resolve the conflict in the circuits.

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that all civil actions for discrimination in employment under 42 U.S.C. § 1981 are actions "arising under" an Act of Congress that predates 28 U.S.C. § 1658's effective date of December 1, 1990, and therefore are not subject to Section 1658's four-year statute of limitations. Indeed, the only provision of Section 1981 that provides a right of recovery for discrimination of any kind predates Section 1658's effective date by well over a century. It is the guarantee, enacted by Congress shortly after the Civil War and now codified in subsection (a) of Section 1981, that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." 42 U.S.C. § 1981(a).

The 1991 amendment to Section 1981, codified in subsection (b), merely added definitional language specifying that the preexisting term "make and enforce contracts" includes "the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Although this new language expanded the scope of the term "make and enforce" to encompass post-formation conduct not previously comprised within that term as interpreted in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the 1991 amendment did not create any new right of action under Section 1981. Rather, as the court of appeals correctly recognized, "the cause of action

for post-formation conduct 'aris[es] under' § 1981(a); that subsection, not subsection (b), provides the actual right to recovery." *Jones v. R.R. Donnelley & Sons Co.*, 305 F.3d 717, 727 (7th Cir. 2002), *cert. granted*, 123 S. Ct. 2074 (2003).

If there were any ambiguity in the meaning of Section 1658 as it relates to Section 1981 claims, one would need only to look to the history and purposes of the respective 1990 and 1991 legislative enactments to find that Congress did not intend the four-year "catch-all" statute of limitations to apply to such claims. As the Seventh Circuit recognized, Congress enacted Section 1658 to alleviate confusion and elected to make it prospective so as not to disrupt litigants' settled expectations regarding applicable statutes of limitations. *Id.* at 725-27. It is difficult to imagine a rule more confusing and inherently disruptive than the one advocated by the petitioners here, which would require litigants and courts to sift through Section 1981 complaints and apply one statute of limitations to claims determined to be actionable under the law as interpreted in *Patterson* and a different statute of limitations to claims determined to be actionable under the new definition added by the Civil Rights Act of 1991.

When Congress enacted the Civil Rights Act of 1991, it clearly was aware of the "catch-all" federal statute of limitations it had enacted just a year earlier. As the court of appeals recognized, Congress also was well aware of the courts' longstanding practice of applying the personal injury statute of limitations of the forum state to claims under Section 1981. *Id.* at 727. Against that backdrop, Congress opted in 1991 not to create a wholly new cause of action for discrimination in termination of employment or treatment of employees, but instead "merely supplied a more precise definition to one of the rights already guaranteed by § 1981—the right to 'make and enforce contracts.'" *Id.* Thus, as the court of appeals recognized, it is apparent that Congress did not view the passage of Section 1658 "as having altered the

practice of borrowing state statutes of limitations for purposes of § 1981." *Id.*

Statutes of limitations serve an important function in our legal system—to prevent litigation of stale claims. Such litigation is onerous in the employment context. With the passage of time, memories fade, witnesses scatter and records become unavailable. Indeed, many employment records lawfully may be destroyed after as little as one year under current federal regulations. The majority of all the states' personal injury statutes of limitations are two years; some are three years; very few are longer than four years. Thus, the net effect of the position urged by the petitioners in this case would be to increase dramatically the number of stale allegations of discriminatory employment terminations, transfers, denials of promotion, and on-the-job treatment that could be litigated under Section 1981 throughout the United States. This Court should not endorse such a result without a clear direction from Congress, which Section 1658 does not provide.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT ALL SECTION 1981 ACTIONS "ARISE UNDER" AN ACT OF CONGRESS THAT PREDATES THE EFFECTIVE DATE OF 28 U.S.C. § 1658 AND THEREFORE ARE NOT SUBJECT TO THE FOUR-YEAR "CATCH-ALL" FEDERAL STATUTE OF LIMITATIONS.

A. Section 1658's Four-Year Statute of Limitations Applies Only to Actions "Arising Under" Acts of Congress Enacted After December 1, 1990.

This case hinges on the meaning of "arising under" in 28 U.S.C. § 1658. Section 1658 creates a four-year statute of

limitations where one is not otherwise provided by law, but *only* for civil actions "arising under" Acts of Congress enacted after its effective date, December 1, 1990. It states, in pertinent part:

> (a) Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658(a). By limiting this new "catch-all" statute of limitations exclusively to actions "arising under" laws enacted after its effective date, Congress clearly made Section 1658 prospective only. The question presented in this case thus boils down to whether the Act of Congress under which the petitioners' claims arise was enacted before or after December 1, 1990.

B. The Court of Appeals Correctly Recognized That All Section 1981 Suits Alleging Employment Discrimination Are Actions "Arising Under" the Ban on Discrimination in the Making and Enforcement of Contracts, Which Congress Enacted Over a Century Before the Effective Date of Section 1658.

The petitioners base all of their claims of discrimination on the law commonly known as "Section 1981"—*i.e.*, 42 U.S.C. § 1981. That law consists today of two subsections relevant here. The first was enacted in the Reconstruction Era immediately following the Civil War. It states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rev. Stat. § 1977.[4] More than 100 years later, in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), this Court held that the foregoing statutory language affords individuals a right to sue in federal court for intentional, race-based discrimination in employment. Subsequently, in *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), the Court held that, because Section 1981 does not contain its own statute of limitations, courts in Section 1981 cases should apply the statute of limitations provided under state law for personal injury actions in the forum state.

The second subsection of Section 1981 was enacted in 1991, when Congress, as part of the Civil Rights Act of 1991, amended the provision quoted above by designating it as 1981(a) and adding a new subsection 1981(b), which states:

> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Pub. L. No. 102-166, 105 Stat. 1071 (42 U.S.C. § 1981(b) of the Civil Rights Act of 1991). Congress added this definitional provision in response to the decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), in which this Court read the original language of Section 1981 as extending to the formation of an employment contract, but not to

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[4] The above-quoted language was enacted in its present form as Section 16 of the Civil Rights Act of 1870, ch. 114, § 16, 16 Stat. 140, 144 (Act of May 31, 1870). It was patterned after similar language contained in Section 1 of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (Act of Apr. 9, 1866).

"conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Id.* at 177.

The question presented here is whether the petitioners' claims, which allege discrimination in terminations of employment and treatment of employees occurring more than two, but less than four, years before they filed their complaint, "aris[e] under" 1981(a) or under 1981(b). If the former, then under the rule of *Goodman v. Lukens Steel*, the claims are subject to Illinois' two-year statute of limitations for personal injuries, and thus are clearly time-barred. If the latter, they may be subject to the prospective, four-year statute of limitations in Section 1658, and thus still may be viable.

A review of the language of the two subsections of Section 1981 makes the answer eminently clear. There can be no civil action "arising under" § 1981(b), because it is purely a definitional section. It creates no right and conveys no right of action; it merely elaborates the meaning of the right, created by § 1981(a), to "make and enforce contracts" on the same terms as "white citizens." A legal action cannot arise under a definition alone; it can arise only under a statutory provision that creates a right. Thus, the cause of action for any alleged violation of Section 1981 necessarily "aris[es] under" § 1981(a), for that subsection alone guarantees the "right to make and enforce contracts"—whatever scope and meaning Congress and the courts impart to that right.[5]

[5] Judge Cole correctly recognized this point in his concurring opinion in *Anthony v. BRT Automotive Sealing Systems, Inc.*, 339 F.3d 506, 517-18 (6th Cir. 2003), and therefore, did not join the panel majority's holding that claims of discriminatory denial of promotions were governed by 28 U.S.C. § 1658's four-year statute of limitations.

As the Seventh Circuit correctly observed, this conclusion follows inexorably from the language and structure of Section 1981:

> The most salient feature of the revised statute is that § 1981(b) simply cannot stand on its own. An action to recover for discriminatory post-formation treatment simply cannot be based solely on § 1981(b). Indeed, without § 1981(a), § 1981(b) is meaningless. Consequently, although post-formation discrimination claims depend on the amendatory language of § 1981(b) in the sense that the definitional language of that subsection makes clear that "make and enforce" includes post-formation conduct, the cause of action for post-formation conduct "aris[es] under" § 1981(a); that subsection, not subsection (b), provides the actual right to recovery.

Jones, 305 F.3d at 727.

In sum, since the sole right of action the petitioners assert in their lawsuit is one that has existed as a federal statute *in haec verba* since 1870, their lawsuit is not governed by the prospective statute of limitations Congress adopted for actions arising under federal laws enacted after December 1, 1990. Rather, like all claims under Section 1981, it is subject to the applicable statute of limitations of the forum state.

II. THE HISTORY AND PURPOSES OF 28 U.S.C. § 1658 AND THE CIVIL RIGHTS ACT OF 1991 CONFIRM THAT CONGRESS DID NOT INTEND THE NEW, FOUR-YEAR STATUTE OF LIMITATIONS TO APPLY TO EMPLOYMENT DISCRIMINATION CLAIMS UNDER SECTION 1981.

The *amicus* believes that the meaning of "arising under" is clear on its face and, for the reasons discussed above, requires the conclusion that the statute of limitations for all Section

1981 claims is the same—*i.e.*, the forum state's limitations period for personal injury claims. Recognizing, however, that some lower courts have found Section 1658 ambiguous as applied to claims that arguably "aris[e] under" statutes originally enacted before December 1, 1990, but amended after that date, this Court may wish to refer to the legislative history and purposes of Section 1658 and the Civil Rights Act of 1991. If so, the Court will find confirmation of the correctness of the Seventh Circuit's decision in this case.

As the court of appeals recognized, Congress enacted Section 1658 in an effort to eliminate confusion about the appropriate statutes of limitations to be applied in cases arising under federal statutes that do not contain their own limitations periods. *Jones*, 305 F.3d at 725-26. *See also Anthony v. BTR Auto. Sealing Sys., Inc.*, 339 F.3d 506, 517-18 (6th Cir. 2003) (concurring opinion of Judge Cole). Congress wished to alleviate the "uncertainty" to which litigants are subjected in the absence of a clearly predetermined limitations period. H.R. Rep. No. 101-734, at 24 (1990). At the same time, Congress opted to make Section 1658 prospective only, so as not to disrupt settled expectations of persons who might wish to litigate claims arising under statutes whose limitations periods had already been determined by judicial decision. *Id.*

This Congressional objective of alleviating uncertainty and settling expectations would be severely undermined by the rule advocated by the petitioners in this case. Under their approach, different claims in the same Section 1981 suit would be subject to different statutes of limitations. Courts and litigants would be required to parse through Section 1981 complaints and attempt to distinguish between claims that would have been actionable under this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), and claims that became actionable only as a result of the 1991

Civil Rights Act's amendment to Section 1981. The results predictably would be chaotic, particularly in large class actions under Section 1981.

This case demonstrates the muddle. Under Petitioners' and the Government's theory, Petitioners' termination and hostile environment claims are timely under Section 1658. On the other hand, their job classification as temporary employees, an issue the district court declined to address,[6] may be viewed as "contract formation" and therefore be time-barred.

The Third Circuit aptly described this chaos in *Zubi v. AT&T Corp.*, 219 F.3d 220 (3d Cir. 2000), in rejecting the approach the plaintiffs' advocate here. The court noted that:

> [The plaintiffs'] interpretation results in different statutes of limitations being applied to plaintiffs suing under the same statute depending on the particular facts of their claims. Thus, for example, plaintiffs who invoke § 1981 because they have been victims of discrimination in hiring will have their claims governed by one statute of limitations, while plaintiffs who invoke the same statute because they are victims of a discriminatory discharge will have their claims governed by another [statute of limitations].

Id. at 224. Thus, as the Third Circuit went on to observe, the plaintiff's approach would "generate exactly the kind of confusion and unfairness that Congress sought to avoid" when it enacted Section 1658 in 1990. *Id.*

Congress, moreover, was well aware just a year later, when it undertook to overrule this Court's *Patterson* decision as part of the Civil Rights Act of 1991, of the established judicial practice of applying the forum state's personal injury statute of limitations to all actions for discrimination in the making and enforcement of contracts under Section 1981.

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[6] *See* note 3, *supra*.

See H.R. Rep. No. 102-40(I), at 63 (1991), *reprinted in* 1991 U.S.C.C.A.N. at 549, 601. Indeed, Congress expressly noted that Section 1981 claims typically were subject to limitations periods of "two to three years, and . . . up to six years in some states." *Id.* (footnote omitted). *See also* H.R. Rep. No. 102-40(II), at 22 n.32 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 716 n.32. Yet it chose not to enact a separate, new statute prohibiting the types of post-formation discrimination in employment contracts that the plaintiff in *Patterson* had attempted to litigate under Section 1981. Instead, Congress opted simply to amend Section 1981 to bring "performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship" within the existing statutory guarantee of the same right to "make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981.

Thus, it can only be inferred that the 1991 Congress intended allegations of post-hire employment discrimination to be subject to the same limitations period as other alleged violations of the existing statutory guarantee already set forth in Section 1981. This conclusion follows not only from the presence of the above-cited, express references to the established practice of applying analogous state statute of limitations to Section 1981 claims, but also from the absence of any mention, anywhere in the legislative history of the Civil Rights Act of 1991, of the four-year "catch-all" statute of limitations enacted the preceding year in Section 1658.

It is noteworthy in this regard that, in enacting the Civil Rights Act of 1991, Congress was particularly attentive to statute of limitations issues it viewed as problematic. Thus, in Section 112 of the 1991 Act, Congress amended § 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), to alter the rule of law handed down in *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), concerning when Title VII's statute of limitations begins to run in cases involving the application of

intentionally discriminatory seniority systems. Also, in Section 115 of the Civil Rights Act of 1991, codified at 29 U.S.C. § 626(e), Congress replaced the then-existing two- and three-year statutes of limitations under the Age Discrimination in Employment Act (ADEA)[7] with a requirement that civil actions be filed within 90 days after a charging party's receipt of notice that the Equal Employment Opportunity Commission (EEOC) has dismissed or otherwise terminated proceedings on a charge of age discrimination. Similarly, in Section 114 of the Civil Rights Act of 1991, Congress amended 42 U.S.C. § 2000e-16(c) to provide that federal sector complainants would have 90 days, rather than 30 days, within which to file suit after any of various triggering events specified in that subsection.

In sum, Congress was fully cognizant of the time-limits applicable to suits under each of the statutes it amended as part of the Civil Rights Act of 1991, and it acted affirmatively to fix those it thought needed fixing. It surely also was well aware of the "catch-all" statute of limitations it had enacted just a year earlier in Section 1658. Against this background, the fact that Congress amended a definitional provision of Section 1981 but did not make any provision for a new or different statute of limitations for actions brought under that section further confirms the Seventh Circuit's conclusion: Congress simply did not view the passage of Section 1658 "as having altered the practice of borrowing state statutes of limitations for purposes of § 1981." *Jones*, 305 F.3d at 727.

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[7] The ADEA previously had provided a two-year period for filing suit for non-willful violations and a three-year period for filing suit for willful violations.

III. IN THE ABSENCE OF A CLEAR DIRECTION FROM CONGRESS, THIS COURT SHOULD NOT ADOPT AN INTERPRETATION OF SECTION 1658 THAT WOULD VASTLY INCREASE LITIGATION OF STALE CLAIMS OF EMPLOYMENT DISCRIMINATION.

Whenever Congress has enacted a law designed specifically to provide a right of action for employment discrimination, it has included time-limits to prevent litigation of stale claims. In Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et-seq*., for example, Congress imposed a dual scheme of time-limits. First, it stipulated that a person alleging an unlawful employment practice must file a timely administrative charge within 180 or 300 days after the occurrence of the alleged unlawful practice. 42 U.S.C. § 2000e-5(e)(1).[8] Second, Congress specified that an individual claiming to be aggrieved under Title VII has 90 days within which to bring a civil action after receipt of a "notice of right to sue" from the EEOC pursuant to 29 C.F.R. § 1601.28. 42 U.S.C. § 2000e-5(f)(1). Congress later made these same time-limits applicable to proceedings under Title I of the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111-12117, and as noted above, applied a similar 90 limit to actions under the Age Discrimination in Employment Act. 29 U.S.C. § 626(e).

As this Court has recognized, such time-limits serve a valuable purpose in employment discrimination statutes: "The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past."

[8] The time-limit is 300 days in "deferral" states (*i.e*., states having their own agencies with authority to grant or seek relief from the alleged employment practice), and 180 days in non-deferral states. *Id*.

Delaware State Coll. v. Ricks, 449 U.S. 250, 256-57 (1980) (quoting *Johnson v. Railway Express Agency, Inc*., 421 U.S. 454, 463-64 (1975)). As this Court went on to observe:

> It should not be forgotten that time-limitations provisions themselves promoted important interests; "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

Ricks, 449 U.S. at 259-60 (1980) (quoting *Johnson*, 421 U.S. at 463-64). *See also Mohasco Corp. v. Silver*, 447 U.S. 807, 820 (1980) (Title VII's charge-filing time-limit reflects a congressional "judgment that most genuine claims of discrimination would be promptly asserted and that the costs associated with processing and defending stale or dormant claims outweigh the federal interest in guaranteeing a remedy to every victim of discrimination").

Although Congress has not subjected civil actions for employment discrimination under Section 1981 to the same time-frames as civil actions brought under Title VII, the burden this Court recognized in *Ricks* of "defending claims arising from employment decisions that are long past," 449 U.S. at 256-57 (citations omitted), is no less for employers in cases brought under Section 1981 than under Title VII. Regardless of the statute under which a case is brought, litigants and fact-finders are likely to confront serious obstacles when faced with claims based on workplace events dating back more than two or three years.

As the Fifth Circuit has observed, statutes of limitations "reflect the valuable policy of requiring 'the prompt vindication of known rights to assure that the defendant is not prejudiced as a result of lost evidence, fading memories, and disappearing witnesses.'" *Jones v. Alcoa, Inc*., 339 F.3d 359, 367 (5th Cir. 2003) (citation omitted). In today's business world, rapid change and worker mobility are the orders of the

day. In this environment, intervals of more than two or three years can be like an eternity. Companies change hands. Operations are restructured. Employees leave to go to other companies, other industries, and even other parts of the world. Memories fade. Employment records disappear or become unavailable.

Federal employment record-keeping regulations reflect at least some recognition by the employment-law enforcement agencies of the burdensomeness to employers of having to keep employment records for inordinately long periods of time. Thus, they generally limit mandatory record-retention periods, except insofar as they are relevant to pending administrative charges or lawsuits. For example, under the applicable regulation of the EEOC, the mandatory retention period for most employment records is one year. 29 C.F.R. § 1602.14.[9] Many large companies take the more cautious approach of preserving employment records until the limitations period for a possible Section 1981 action has expired. Adoption of the position advocated by the petitioners in this case would effectively require employers taking this approach to save *all* employment records for at least four years, even

[9] 29 C.F.R. § 1602.14 states in pertinent part:

> Any personnel or employment record made or kept by an employer (including but not necessarily limited to requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation and selection for training or apprenticeship) shall be preserved by the employer for a period of one year from the date of the making of the record or the personnel action involved, whichever occurs later . . . . Where a charge of discrimination has been filed, or an action brought by the Commission or the Attorney General, against an employer under title VII or the ADA, the respondent employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or the action.

where no charge or lawsuit has yet been filed. This would add enormously to the record-keeping burden already faced by employers.

EEAC's research indicates that in in the vast majority of the 50 states of the United States, the statute of limitations for personal injury claims is three years or less.[10] Under the position advocated by the petitioners in this case, plaintiffs in those states still would have to bring claims alleging discriminatory refusal to hire under Section 1981 to court within these two- or three-year time-frames, but they could sit back and let claims alleging discrimination in termination of employment or treatment during the course of employment gather dust for as long as four years before bringing them to court. A few states currently have 4-year statutes of limitations for personal injury claims, and thus would appear to be unaffected by the petitioners' approach.[11] A few others have statutes of limitations longer than four years for such claims.[12] In those few states, adoption of the petitioners' position presumably would mean that plaintiffs would have to bring claims of discrimination in respect to termination or treatment during employment to court within four years, but could still wait up to five or six years to file suit on claims of discrimination in hiring.

Thus, in the vast majority of all states, the net effect of the petitioners' position would be to increase very substantially the number and potential scope of stale claims of employment discrimination that could be brought to the courts to be litigated. At the same time, it would subject parties and

[10] *See generally, State Statutes of Limitations as Affecting Federal Civil Rights Actions Under 42 U.S.C.A. § 1981*, 29 A.L.R. Fed. 710 (1976 & Supp. 2002).

[11] *E.g.*, Fla. Stat. § 95.11(3)(o); Wyo. Stat. Ann. § 1-3-105.

[12] *E.g.*, Mo. Rev. Stat. § 516.120(4) (five years); Me. Rev. Stat. tit. 14, § 752 (six years).

courts in Section 1981 actions to the unwieldy exercise of having to apply different statutes of limitations to different claims in the same case, based on a determination as to whether the particular type of conduct alleged in each particular claim would have been actionable under this Court's holding in *Patterson v. McLean Credit Union* or only became actionable as a result of the Civil Rights Act of 1991. In the absence of any clear indication that Congress intended such bizarre results when it enacted Section 1658, and in the face of clear evidence that Congress, in fact, did *not* intend to subject Section 1981 actions to the four-year "catch-all" limitations period when it amended Section 1981 as part of the Civil Rights Act of 1991, this Court should eschew an interpretation of Section 1658 that would spawn such an increase in potential litigation of stale claims and impose such onerous additional burdens on employers and courts.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Seventh Circuit in this case.

Respectfully submitted,

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No. 02-1205

In the
Supreme Court of the United States

EDITH JONES, et al.,
Petitioners,

v.

R.R. DONNELLEY & SONS CO.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE STATES OF ALABAMA, HAWAII, LOUISIANA, MASSACHUSETTS, TEXAS, AND UTAH AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

In a civil action alleging race discrimination in the "mak[ing] and enforc[ing]" of contracts under 42 U.S.C. § 1981, should a court borrow the forum state's statute of limitations for personal injuries, following *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), or apply the borrowing rule to contract formation claims and the catch-all four-year limitation period of 28 U.S.C. § 1658 to all other claims under § 1981?

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STATEMENT OF INTEREST

The States of Alabama, Hawaii, Louisiana, Massachusetts, Texas, and Utah respectfully submit this brief as amici curiae in support of respondent R.R. Donnelley & Sons Co., urging this Court to affirm the judgment of the United States Court of Appeals for the Seventh Circuit. As frequent litigants in their own courts and in the federal courts, the amici States have a strong interest in ensuring that statutes of limitations are sensibly construed and easy to administer. Statutes of limitations "are not simply technicalities" but are "fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980).

The rule that petitioners and their amici propose would create confusion and unnecessary litigation for the States. The onerous task that their rule requires, of determining whether a legal liability is newly created, would be an unwelcome burden for the States, whose budgets are already strained by the ever-growing tide of litigation against them. States would be compelled to scour outdated versions of the United States Code in an effort to determine whether an Act of Congress created a fresh claim or simply clarified an old one. Because of the uncertainty and expense that the proposed construction would cause the States, amici have an interest in opposing it.

Moreover, the "federal ingredient" or "essential element" test (which petitioners suggest but implicitly abandon) would unsettle the legitimate expectations of those States that have understandably assumed that state law claims would be governed by state limitations periods. Under this definition, state claims that include a federal ingredient and that lack an express limitations period would be governed by section 1658. Because of the

displacement of state common law limitations periods, section 1658 implicates a state's sovereignty. As this Court recognized well over a century ago, "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *M'Elmoyle v. Cohn*, 38 U.S. (13 Pet.) 312, 327 (1839).

Finally, the "federal ingredient" or "essential element" definition that petitioners and their amici advance would retroactively lengthen the limitation periods of certain claims against the States. In that respect, the States' interest is similar, if not identical, to their interest in *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002), in which this Court held that the tolling provision of the federal supplemental jurisdiction statute, 28 U.S.C. § 1367(d), should not be read to apply to claims against non-consenting States that were filed in federal court but later dismissed on Eleventh Amendment grounds. For all these reasons, amici have a significant interest in arguing against an overbroad, unsound interpretation of section 1658.

STATEMENT OF THE CASE

Amici adopt the statement of the case in respondent's brief.

SUMMARY OF THE ARGUMENT

The language of 28 U.S.C. § 1658 is plain enough. It applies only to "civil action[s] arising under an Act of Congress enacted after [December 1, 1990]." "Arising under" is the operative phrase, and the natural understanding of that phrase in this context would suggest that section 1658 applies to civil actions whose statutory source is a post-December 1, 1990 statute. An

action like the one in this case — asserted under the prohibition on discrimination in the making of contracts in 42 U.S.C. § 1981(a), which long pre-dates December 1, 1990 — cannot be said to "arise under" an amendment to that statute.

Furthermore, the alternative interpretations proposed by petitioners and their amici — which have traction only if section 1658 is first determined to be ambiguous — lead to nonsensical results. Petitioners give no good reason for this Court to construe section 1658 in a manner other than its ordinary meaning. "Arising under" means "originating in," not "deriving one of many essential elements from", a given statute. For this reason, the judgment of the court of appeals was sound and should be affirmed.

ARGUMENT

I. The Decision Below Is Faithful to the Plain Meaning of the Statute.

Statutory construction begins, of course, with the text of the statute. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 439 (2002). "Where, as here, the statutory language is unambiguous, the inquiry ceases." *Id.* The ordinary meaning of the term "arising under" in section 1658 — originating in, springing up from — supports the decision below. Petitioners' attempt to turn "arising under" into a term of art with an extraordinary meaning should be rejected.

A. A Claim to Enforce a Right "Arises Under," Or Springs Up From, the Statutory Provision That Codifies the Right, Not a Collateral Definitional Section.

Under the ordinary meaning of the words in the statute, section 1658 does not apply to petitioners' claims.

Section 1658 applies only to "civil action[s] arising under an Act of Congress enacted after [December 1, 1990]." A "civil action," as the United States notes, is "a legal demand instituted in a court to enforce a right." U.S. Br. 10. And "arising under," in common parlance, means to "spring up" or to "originate." U.S. Br. 10-11 (quoting American Heritage Dictionary 99 (3d ed. 1991); Oxford English Dictionary 445 (1933)); *see also* Black's Law Dictionary 102 (7th ed. 1999) ("stemming from").

Under these definitions, petitioners' claims arise under section 1981(a), not section 1981(b). A legal demand to enforce a right is best understood as "arising under"— "springing up from" or "originating in" — the statutory provision that codifies that right. It does not "spring up from" a collateral provision that defines a particular term in the statutory provision codifying the right. No one would say that they are bringing suit under a definitional provision. A RICO action, for example, is brought under the substantive provisions in 18 U.S.C. § 1962, not under the definition of "racketeering activity" in 18 U.S.C. § 1961(1). *See Scheidler v. National Organization of Women, Inc.*, 123 S. Ct. 1057, 1063 (2003). A Family and Medical Leave Act suit is brought under the private right of action in 29 U.S.C. § 2617(a)(2), not under the definition of "employee" in 29 U.S.C. § 2611(3). *See Nevada Dept. of Human Resources v. Hibbs*, 123 S. Ct. 1972, 1976 (2003).

True to this plain meaning, courts generally refer to claims like petitioners' as having been brought under section 1981(a), which codifies the "right ... to make and enforce contracts" free from discrimination. *See, e.g., Taylor v. Runyon*, 175 F.3d 861, 865 (11th Cir. 1999); *Danyluk-Coyle v. St. Mary's Medical Center*, 2001 WL 771048, *1 (E.D. Pa. 2001); *Bevil v. Smit Americas, Inc.*, 883 F. Supp. 168, 169 (S.D. Tex. 1995). Although the

claims could not have succeeded without section 1981(b), they arose under section 1981(a).

It is irrelevant that petitioners could not have prevailed on their conditions-of-employment claims before 1991. Under the text of the statute, the issue is not whether the type of claim was viable before December 1, 1990, but rather whether the "Act of Congress" under which the claim has arisen was enacted before that date. 28 U.S.C. § 1658. Because their claims arise under section 1981(a), and because that provision was enacted well before December 1, 1990, petitioners' claims are not subject to the four-year limitation period in section 1658. They are subject to the forum state's statute of limitations for personal injury claims, under *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987).

B. The "Essential Element" or "Federal Ingredient" Interpretation of Section 1658 Is Irrelevant and Does Not Override the Ordinary Understanding of the Phrase "Arising Under."

Well aware that the ordinary understanding of the statute sinks their claims, petitioners argue that the words "arising under" constitute a legal "term of art" with a settled meaning that must be applied here. Petr. Br. 13. They contend that a claim arises under a federal law whenever that law is an "essential element" of the claim. Petitioners' amici make this argument as well, stating that a case arises under a federal law whenever the law "'forms an ingredient of the original cause'" or is a "'necessary element'" of the cause. U.S. Br. 10 (quoting *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 823 (1824); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 808 (1988)).

The primary flaw in this argument is that the "essential element" interpretation of the term "arising under" has been employed in but a single context: subject matter jurisdiction. It has not been exported elsewhere. In addressing the Medicare and Social Security Acts, for example, this Court has defined "arising under" to mean "inextricably intertwined," not an "essential element" or "federal ingredient." *Heckler v. Ringer*, 466 U.S. 602 (1984); *Weinberger v. Salfi*, 42 U.S. 749 (1975). What it means to be an "essential element" of a claim is not even settled within the context of subject matter jurisdiction. *See, e.g., Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986) (holding that a claim does not arise under federal law for purposes of 28 U.S.C. § 1331 when Congress intended "no federal private right of action," even though the federal law is an essential element of the claim); *Caterpillar v. Williams*, 482 U.S. 386, 391 (1987) (claim "aris[es] under" § 301 of the LMRA only if it is "substantially dependent upon the analysis of a collective bargaining agreement") (quotations omitted); *Metropolitan Life Ins. Co. v. Taylor*, 465 U.S. 58, 65 (1987) (claim "aris[es] under" § 502(a) of ERISA only if it is a claim to enforce benefit rights from a covered plan).

Furthermore, there is no logical reason to apply the "essential element" or "federal ingredient" definition to section 1658, the purpose of which bears no resemblance to the one underlying 28 U.S.C. § 1331. In section 1331, Congress granted the federal courts jurisdiction to interpret federal law and thus to preserve the consistency of federal law. A broad definition of "arising under" helps serve that purpose. Section 1658, by contrast, was not designed for maximum breadth. Congress rejected a proposed statute that would have covered all federal laws lacking a limitation period. Report of the Federal Courts Study Committee (1990). Instead of enacting a broad rule, Congress intended to provide a sensible rule that

would not operate "retrospective[ly]." H.R. Rep. No. 101-734, at 24 (1990).

Section 1658 was meant to provide a single limitations period for a given legal claim. Whereas a claim can "arise under" multiple federal laws for purposes of subject matter jurisdiction, a claim can sensibly arise under only one statute for the purpose of determining the limitation period. Because section 1331 and section 1658 serve different objectives, there is no reason to transpose the definition of "arising under" from one to the other.

II. Even If the Term "Arising Under" in Section 1658 Were Ambiguous, the Court Should Reject The Definition Advanced By Petitioners And Affirm The Decision Below.

At worst, the term "arising under" in section 1658 is ambiguous. The ambiguity might permit use of the "essential element" interpretation from section 1331, if that interpretation were sensible. But it is not. First, the "essential element" interpretation could displace state limitation periods. Second, it would cause section 1658 to apply retroactively. Third, it would result in a single subsection having multiple limitation periods. And fourth, it would cast serious constitutional doubt on the application of section 1658 to cases in which a State is a defendant.

A. The "Essential Element" Definition Could Displace State Limitation Periods.

As the United States concedes, "where the vindication of a right under state law necessarily turn[s] on some construction of federal law," that state claim "arises under" federal law in the "essential element" sense of the term. U.S. Br. 12 (quoting *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (internal quotation marks omitted)). For example, if a state prohibition on

employment discrimination invoked a federal definition of "employer," federal law would be an "essential element" of claims brought under that state statute. Those claims would be covered by section 1658 under the "essential element" definition, unless the state legislature had enacted an express limitations period for them. If the limitation period had previously been supplied by state common law, section 1658 would override it.

Congress did not intend this result, which would impinge upon state sovereignty. As this Court explained more than 160 years ago, "the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *M'Elmoyle v. Cohn*, 38 U.S. (13 Pet.) 312, 327 (1839). Moreover, displacing state limitations periods would unsettle the expectations of litigants, who understandably assume that state claims are subject to state limitation periods, as they have been in the past. Litigants might now find that previously viable claims have become time-barred, or that previously barred claims have become viable again. To remedy the situation and restore the status quo, state legislatures would be forced to enact statutes of limitations for each of these claims. Until the legislatures discharged this burden, section 1658 would have the effects that, assuredly, no member of Congress ever expected.

B. The "Essential Element" Definition Would Cause Section 1658 to Have Impermissible Retroactive Effect.

Under the "essential element" definition, whenever any element of a claim is based on a federal law amended after December 1, 1990, the claim would be covered by section 1658. *Zubi v. AT&T Corp.*, 219 F.3d 220 (3d Cir. 2000) (under the "essential element" definition, "the four-year limitations period would apply[] to any civil lawsuit containing a claim based on a statute that has been amended in any way after December 1, 1990"). It would not matter whether the claim was viable under pre-existing law. The claim would now depend on the amended statute, not the former statute, which is no longer even on the books. The amended statute is the "essential element."

Thus, claims that previously borrowed a limitations period from state law would now be subject to section 1658's four-year period. As noted above, some viable claims might instantly become time-barred, and barred claims might get a second life. This result would fly in the face of Congress's decision to avoid retroactive application:

> [W]ith respect to many statutes that have no explicit limitations provision, the relevant limitations period has long since been resolved by judicial decision ... [and] retroactively imposing a four year statute of limitations ... would threaten to disrupt the settled expectations of a great many parties. Given that settling expectations ... is an essential purpose of statutes of limitations, the Committee was reluctant to apply this section retroactively.

H.R. Rep. No. 101-734, at 24 (1990). It would also flout the Third Circuit's observation that "[s]ection 1658 seeks to distinguish between cases arising under certain Acts of Congress from cases arising under other Acts of Congress for the purpose of preserving existing statute of limitations case law." *Zubi*, 219 F.3d at 228.

C. The Essential Element Definition Would Result In A Single Subsection Having Multiple Limitations Periods.

Third, petitioners' definition would produce the anomalous result that the same words in the same subsection of the same statute could be subject to two more limitations periods. Petitioners and their amici acknowledge that claims of racial discrimination in the "mak[ing] and enforc[ing]" of contracts that were viable before the Civil Rights Act of 1991 would not be subject to section 1658 and would continue to be governed by *Goodman*. Yet petitioners insist that claims of racial discrimination in the "mak[ing] and enforc[ing]" of contracts that became viable in 1991 would be subject to section 1658. The claims derive from the same three words of the same sentence of the same statutory text, but two different statutes of limitations would apply.

The United States attempts to skip past this absurdity — and the disruption it would cause to litigants' reasonable expectations about sensible limitations periods — by labeling it a mere "policy concern." U.S. Br. 27. But any construction producing an absurd result is heavily disfavored, unless compelled by unambiguous statutory text. *United States v. X-Citement Video*, Inc., 513 U.S. 64, 70-71 (1994). Here, petitioners can find no comfort in the text of the statute, which at worst is ambiguous and at best compels the wholesale rejection of petitioners' proposed definition.

D. The Essential Element Definition Would Cast Serious Constitutional Doubt on the Application of Section 1658 to Cases Involving States as Defendants.

Fourth, if the Court adopted the "essential element" definition, there would be a serious question whether

section 1658 could be applied to cases involving States as defendants. This Court has not yet addressed whether the lengthening of a limitations period against an unconsenting State constitutes an abrogation of state sovereign immunity; however, the Court has made clear that the issue "raises a serious constitutional doubt." *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 543 (2002). In *Raygor*, the State had consented to suit in state court, but only under a particular statute of limitations. This Court thus held that a federal tolling statute, 28 U.S.C. § 1367(d), might be unconstitutional as applied to the State. By expanding the terms of the State's waiver of sovereign immunity, the statute at least arguably encroached upon that immunity.

To avoid this constitutional issue, and to preserve the "historic powers" of the States, the Court imposed a clear statement rule. *Raygor*, 534 U.S. at 543. As the Court provided, "[w]hen Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted)). This rule "reflects 'an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers which Congress does not readily interfere.'" *Raygor*, 534 U.S. at 544 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461, 464 (1991)).

By the same logic, section 1658 could not apply to many cases involving States as defendants, if the "essential element" definition were adopted. Under that definition, pre-existing claims that now arise under amended statutes would be subject to the four-year limitation period, instead of the period borrowed from state law. If the state-law period were less than four

years, section 1658 would effectively lengthen the limitation period. Under *Raygor*, Congress cannot lengthen the limitation period for a suit against a State unless Congress makes a clear statement that it intends to do so. Because section 1658 contains no such statement, it could not be applied to cases involving States as defendants.

As a result, were this Court to adopt the "essential element" definition, it would likely have to make an exception for cases in which the States are defendants. With respect to section 1981, for example, States that were previously subject to two- or three-year limitations periods would continue to be subject to those periods for all claims, even though other defendants would be subject to a four-year period for claims made viable by the 1991 Civil Rights Act.

There is no reason to adopt such a rule. The text of the statute does not support it. The legislative history undermines it as well. Thus, if the Court concludes that section 1658 is ambiguous, it should construe it in a simple, sensible manner, without creating the need for exceptions and various limitations periods for different classes of defendants.

III. Petitioners' and Their Amici's Attempt to Refine the "Essential Element" Definition Only Causes Further Confusion.

Petitioners and their amici have another creative alternative to plain meaning and sensible results. The United States proposes that a claim "arises under" a statute enacted after December 1, 1990, if that statute (1) is an essential element of the claim and (2) "create[d] liabilities that had no legal existence before the Act was passed." U.S. Br. 19. Because this alternative is without textual support and would prove utterly unworkable —

especially for States, which are frequent defendants — the Court should reject it.

A. The Alternative Definition Has No Basis in the Text of the Statute.

First, the alternative definition has no roots in the text of the statute. Neither petitioners nor their amici can point to a single occasion in which "arising under" has been defined in this manner. Even in the context of subject matter jurisdiction under section 1331, courts have never required that a statute "create liabilities that had no legal existence before the Act was passed."

The proposal of this novel definition undercuts the argument by petitioners and their amici that "arising under" is a "term of art" with a settled meaning. Petr. Br. 13; *see also* U.S. Br. 6-7. Adding an additional element to the definition confirms that "arising under" does not mean "essential element." If it had that singular meaning, petitioner and their amici would be in no position to propose alternatives.

B. The Alternative Definition Is Unworkable.

Second, this alternative definition would be unworkable, especially for the States, who must defend against countless federal claims. Although petitioners and their amici do not articulate when a statute "create[s] liabilities that had no legal existence before the Act was passed," it appears that a statute would not create new liabilities if those liabilities already existed under a different statute. As a result, if Congress repealed section 1981 and replaced it with a broad prohibition on discrimination, courts would have to determine not only whether a claim fell within the new, broader prohibition, but also whether it fell within old section 1981. If the claim were valid under section 1981 (or some other provision pre-dating section 1658, such as Title VII of the

Civil Rights Act of 1964), the *Goodman* borrowing rule would apply. If the claim were not valid under section 1981 or some other pre-December 1, 1990 law, then section 1658 would apply. Indeed, under this definition, Congress could enact an independent, stand-alone cause of action; if that cause of action happened to mirror a claim based in an existing statute, section 1658 would not apply.

The consequences of this rule would be two-fold. First, in this particular case, petitioners would lose, because the legal liabilities that they allege pre-existed the Civil Rights Act of 1991. The liabilities existed under Title VII. Second, and more generally, litigants and courts in all future cases would have to scour prior versions of the United States Code to determine whether a claim is new or was previously viable. Assuming that the now-outdated (and probably discarded) Code volumes were accessible, this onerous task would be an inefficient use of judicial resources and an unwelcome burden to all litigants — especially the States, whose budgets are already overtaxed by the ever-growing tide of litigation.

Petitioners might suggest other ways to construe or limit the phrase, "create liabilities that had no legal existence before the Act was passed." They might propose to limit the search to the statutory regime being changed. If that particular regime — say, section 1981 — did not protect the right being asserted prior to December 1, 1990, then the right would new, even if another regime — say, Title VII — provided for it. No one — not even the United States — has endorsed such a restriction. Every such attempt to gerrymander the "essential element" definition with addenda and provisos moves the definition even farther from the text of the statute and confirms that "arising under" is not a term of art.

Finally, any attempt to distinguish newly created liabilities from old ones runs into the same formidable obstacle — that it will not always be clear whether a liability previously existed. As the Third Circuit explained, "the line between an amendment that modifies an existing right and one that creates a new right is often difficult to draw." *Zubi*, 217 F.3d at 224. "Amendments frequently are intended to clarify the law when there has been a difference of opinion regarding the interpretation of an existing statute." *Id.* "In such situations, conflicting views on whether the clarifying amendment created new rights or merely codified the preexisting case law are what occasion the amendment." *Id.*

Section 1981 is illustrative. Had Congress amended the statute before *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), it would have been amending the law in light of a circuit split. As a result, different circuits might reach different conclusions about whether the amendment created a new liability or confirmed an old one. Those circuits that had already construed section 1981 to include conditions-of-employment claims would hold that the amendment was just a clarification and did not create any new liabilities. By contrast, the Fourth Circuit, which interpreted "make and enforce" to exclude those claims, would find that the amendment created a new liability.

Under this hypothesized limitation, any time Congress amended a statute to eliminate a circuit split, different circuits would end up with different limitation rules. Even more problematic, any time Congress clarified any law — whether or not it was resolving a circuit split — all litigants and courts will be forced to grapple with the question whether the clarification created a new liability. Parties and judges alike will have to decide two questions in every case. First, as always,

what is the law? Second, what was the law? Because "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitation," *Wilson v. Garcia*, 471 U.S. 261, 266 (1985), this Court should reject so Byzantine an interpretation of section 1658.

These problems affect all litigants but are particularly acute with respect to the States. States and state officials frequently find themselves as defendants in lawsuits against a litany of federal claims, from section 1981 to section 1983, and from Title VII to the Family and Medical Leave Act. If this Court adopts petitioners' definition, every time Congress amends any statute that could be applied to the States, they will have to decide whether or not the amendment created a new liability or clarified an old one. It is doubtful that Congress intended to impose this burden when it enacted section 1658.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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